Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF OHIO,

Petitioner,

v

MATTHEW REINER,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In *Ohio v. Reiner*, 532 U.S. 17 (2001), this Court summarily reversed a holding by the Supreme Court of Ohio that a government witness in a criminal case who was denying culpability could not validly assert a Fifth Amendment privilege against self-incrimination. On remand, the Supreme Court of Ohio acknowledged the witness's privilege, but held that immunity was not proper, because immunity is never proper in a case, such as this, in which the defense was accusing the witness of being the offender and in which either the defendant or the witness could be the guilty party. Can a state court judicially amend the Fifth Amendment and summarily alter the historical and constitutionally-grounded grant of governmental immunity in a manner which defeats the government's grant of immunity to key prosecution witnesses and effectively precludes the prosecution of those persons believed by the government to be the likely criminal offenders?

II. On remand from this Court, the Supreme Court of Ohio also held that the same government witness, who had invoked her Fifth Amendment privilege and whom the court held was not entitled to immunity, could be called to the stand by the defense for the sole purpose of invoking the privilege against self-incrimination in front of the jury. Does this procedure violate the government's right to due process of law?

PARTIES TO THE PROCEEDING

The following entities and individuals are parties in the court below.

The State of Ohio, by Julia R. Bates, Lucas County Prosecuting Attorney; Matthew Reiner as the defendant.

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State v. Reiner, 94 Ohio St.3d 1434, 761 N.E.2d 49 (2002)

JURISDICTION

The Supreme Court of Ohio issued its opinion on November 28, 2001. The petitioner filed a Motion for Reconsideration, which the Court denied on January 16, 2002.

Under Rules 13.3 and 29 of the Rules of the United States Supreme Court, this Petition for Writ of Certiorari was timely filed on or before April 15, 2002. This Court's jurisdiction is invoked under 28 U.S.C. Secs. 1254(1) and 2106.

OPINION BELOW

This petition seeks review of the Supreme Court of Ohio's 4-3 decision in *State v. Reiner*, 93 Ohio St.3d 601, 757 N.E.2d 1143 (2001). See App., *infra*, 1-18. The Supreme Court of Ohio's decision was decided on remand from this Court in *Ohio v. Reiner*, 532 U.S. 17 (2001).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States
Amendment V
(Appendix 20)

Constitution of the United States
Amendment VI
(Appendix 20)

Constitution of the United States
Amendment XIV
(Appendix 21-22)

STATUTE INVOLVED

Ohio Rev. Code Ann. § 2945.44
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STATEMENT OF THE CASE

This case initially came before this Court in *Ohio v. Reiner*, 532 U.S. 17 (2001), primarily on the issue of whether the Ohio Supreme Court was correct in its determination that Susan Batt, the nanny for Alex Reiner, did not have a Fifth Amendment privilege because she proclaimed her innocence when she testified.[1] This Court summarily reversed the Ohio Supreme Court's erroneous decision and remanded the case to the Ohio Supreme Court for further consideration in light of its decision.

After additional briefing, the Ohio Supreme Court determined that, not only was this Court correct in its determination of the existence of the Fifth Amendment privilege, but also that the existence of the privilege was, presumably, so noteworthy and this Court's rebuke so sharp that it created a "super privilege" for Susan Batt that could not be overcome by a grant of immunity. As if that were not enough, it also announced that the defense should be permitted to trumpet the privilege to the jury in any retrial of the case. *State v. Reiner*, 93 Ohio St.3d 601, 605, 757 N.E.2d 1143, 1146 (2001) (Appendix 1-18).[2]

It is from this decision that the State of Ohio now appeals.

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[1]The operative facts in this case are set forth in this Court's Opinion. See *Ohio v. Reiner*, 532 U.S. 17, 18-20 (2001). The State of Ohio adopts these facts as set forth therein.

[2] Petitioner filed a motion with the Ohio Supreme Court, asking it to reconsider its ruling. On January 16, 2002, that court denied the motion. *State v. Reiner*, 94 Ohio St.3d 1434, 761 N.E.2d 49 (2002) (Appendix 19).

REASONS FOR GRANTING THE WRIT

I. A State Supreme Court Cannot Judicially Amend The Fifth Amendment Of The United States Constitution In A Manner That Precludes The Government From Utilizing Its Historically Recognized And Constitutionally Based Power To Grant Immunity To A Witness Who Asserts A Privilege Against Self-Incrimination In Order To Secure Testimony Needed For A Criminal Prosecution.

When this case first reached the Supreme Court of Ohio, that court reversed the conviction of a defendant after finding that the trial court had improperly permitted one witness to be granted immunity. *State v. Reiner*, 89 Ohio St.3d 342, 352-356, 731 N.E.2d 662, 673-676 (2000) (hereinafter *"Reiner I"*). According to the Ohio Supreme Court, the grant of immunity was improper because the witness had consistently denied any culpability in the death of the victim. *Id.*, 89 Ohio St.3d at 355-356, 731 N.E.2d at 675. This Court summarily reversed and remanded the case. In doing so, this Court reminded the state court that the Fifth Amendment protects the innocent as well as the guilty. *Ohio v. Reiner*, 532 U.S. 17, 18, 20-21 (2001).

On remand, the Supreme Court of Ohio found another way to sustain the previous reversal of the conviction. *State v. Reiner*, 93 Ohio St.3d 601, 757 N.E.2d 1143 (2001) (hereinafter *"Reiner II"*)

(Appendix 1-18). This time, the Supreme Court of Ohio held that immunity is never proper in an "either/or" situation, that is, when either the defendant or witness sought to be immunized might be guilty of the offense. *Id.*, 93 Ohio St.3d at 605, 757 N.E.2d at 1146 (Appendix 7). Because the defendant in this case was pointing inculpatory fingers at the witness that the prosecutor had immunized, the Ohio court held that the grant of immunity had not been proper because it did not "further the administration of justice." *Id.* (Appendix 8).

A. The Holding Of The Supreme Court Of Ohio Impermissibly Impinges On The Power Of The Government To Grant Immunity, Injects The Judiciary Into An Area For Which It Is Ill-Equipped, And Acts To The Detriment Of The Witness Who Asserts A Fifth Amendment Privilege Against Self-Incrimination.

The latest decision of the Supreme Court of Ohio in this case improperly infringes upon the Fifth Amendment itself and the Fifth Amendment rights of witnesses. The decision, in effect, has expanded the Fifth Amendment in the "either/or" situation, creating a "super-privilege" that can never be overcome by a grant of immunity. The result is a disturbance of the delicate balance between a witness's right to assert the privilege against self-incrimination and the government's legitimate interest in obtaining needed testimony through grants of immunity.

To see more fully how this is so requires an understanding of the historical roots and intertwining of the privilege against self-incrimination and the prosecutorial tool of granting immunity.

As this Court has recognized, immunity statutes "have historical roots deep in Anglo-American jurisprudence. . . . [T]hey seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify . . . [in those cases in which] the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar v. United States*, 406 U.S. 441, 445-446 (1972). This Court has often "characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in *Ullmann v. United States*, 350 U.S. 422 (1956), such statutes have 'become part of our constitutional fabric.' *Id.*, at 438." *Id.*, at 447.[1]

Scores of state and federal courts have held the same. The United States District Court for the Western District of Missouri explained the history behind immunity statutes and its intimate connection with the Fifth Amendment in *Williams v. Turner*, 702 F.Supp. 1439, 1445 (W.D.Mo. 1988).

> The government's power to compel people to testify, whether in court, before grand

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[1] See also, *Brown v. United States*, 359 U.S. 41, 46 (1959); *Murphy v. Waterfront Commission*, 378 U.S. 52, 95 (White, J., concurring)(1964); *Tehan v. United States*, 382 U.S. 406, 414 n.12 (1966); *Piccirillo v. New York*, 400 U.S. 548, 571 (Brennan, J., dissenting)(1971); *Lefkowitz v. Turley*, 414 U.S. 70, 81-82 (1973); *United States v. Apfelbaum*, 445 U.S. 115, 125 (1980).

juries, or before other governmental agencies, is one firmly established in Anglo-American jurisprudence. "The power with respect to courts was established by statute in England as early as 1562. . . ." [(citation to Statute of Elizabeth, 5 Eliz. 1, c. 9 § 12 (1562).)] *Kastigar v. United States*, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972). The power to compel testimony and the corresponding duty to testify are recognized in the sixth amendment and the Judiciary Act of 1789. *Kastigar*, 406 U.S. at 443-444. "Such testimony constitutes one of the Government's primary sources of information." *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 93-94, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964).

However, this power of the government to compel is tempered by, among other things, a citizen's fifth amendment privilege against self-incrimination. One of our most sacred civil liberties, it has been described as "one of the great landmarks in man's struggle to make himself civilized."

These two important interests were recognized as being at loggerheads even before the birth of the Republic. To solve the problem of accommodating both interests, immunity statutes were adopted. It was not long after the protection against self-incrimination had gained its place in the law that it was recognized that the privilege was not

> applicable when immunity, or "indemnity," in the English usage, had been granted. For example, an Act of Parliament passed in 1710 directed against illegal gambling, which granted immunity to certain individuals involved in such activity if they would return their winnings to the loser, became the model for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York. 9 Anne, c. 14, §§§§ 3-4, (1710); Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of New York, 621, 623 (1894).
>
> "Immunity statutes . . . are not incompatible with [the privilege against self-incrimination]. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." *Kastigar*, 406 U.S. at 445-446. In fact, such statutes have "become part of our constitutional fabric." *Ullmann*, 350 U.S. at 438.

Id. at 1445.[2]

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[2] See also *State v. Carroll*, 83 Wn. 2d 109, 112, 515 P.2d 1299, 1301 (1973) ("statutes which in certain instances provide immunity to a witness in exchange for the privilege against self-incrimination have authentic, historic and logical roots in Anglo-American law, to the extent that they have 'become part of our constitutional fabric.'"); *United States v. Medina*, 41 F.Supp. 2d 38, 48 (D. Mass. 1999) (immunity "has a grand historic pedigree."); *United States v. Pantone*, 634 F.2d 716, 719 (3rd Cir. 1980) ("Immunity statutes have deep historical roots in Anglo-American jurisprudence and have been accepted as 'part of our constitutional fabric. . . .' [Immunity provides a] traditional source of information in an ordered society and an essential tool in the effective enforcement of criminal laws.").

The latest decision of the Supreme Court of Ohio pokes a hole in this constitutional fabric and puts a judicial finger on the scales balancing the Fifth Amendment privilege against self-incrimination and the government's need for testimony. By holding that immunity to a witness in an "either/or" case is never proper, the Ohio court has created a "super-privilege" that can never be overcome. The result is a subversion of both the Fifth Amendment and the historical value that immunity statutes have served.

The holding of the Supreme Court of Ohio judicially usurps a traditionally executive decision concerning when the "prosecutorial tool" of immunity should be employed. It also injects the judiciary into an area that it is ill-equipped to handle. Finally, the holding, although it at first blush appears to strengthen the privilege against self-incrimination, actually works to the disadvantage of the very persons who assert the Fifth Amendment privilege.

Since the very first United States Supreme Court cases dealing with immunity statutes, this Court has viewed the power to grant immunity as one for the executive to control. See, for example, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Brown v. Walker*, 161 U.S. 591 (1896). This Court realizes that it is the prosecutor's role to decide if immunity is the proper method to obtain a recalcitrant witness's testimony. As it stated in *United States v. Mandujano*, 425 U.S. 564, 575, 576 (1976): "[T]he prosecutor must determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness. . . . Immunity is the Government's ultimate

tool for securing testimony that otherwise would be protected; unless compelled over an appropriate claim of privilege. *United States v. Blue*, 384 U.S. 251, 255 (1966)."

State and Federal Courts, furthermore, have adopted this view that the executive has the ultimate power to chose who is granted immunity at trial. In *Commonwealth v. Brady*, 470 Pa. 420, 426-427, 368 A.2d 699, 703 (1977), the Supreme Court of Pennsylvania ruled "that immunity statutes have historically been considered a prosecutorial 'investigative tool. . . .' [T]he underlying premise upon which immunity statutes have been enacted is their effectiveness in securing prosecutorial information."

A very similar result was reached by the Supreme Court of Nebraska in *State v. McCown*, 189 Neb. 495, 502, 203 N.W.2d 445, 450 (1973), when it ruled, "Immunity has historically been a governmental investigative tool for offenses which could not be investigated or proved otherwise. It is solely a governmental prerogative."

The United States Court of Appeals for the Tenth Circuit stated the concept that the executive decides issues of immunity in *McGee v. Crist*, 739 F.2d 505, 509 (10th Cir. 1984): "Under the statutory scheme the grant of immunity rests in the sound discretion of the executive branch of government."

Many courts, including this Court, have ruled, moreover, that the judicial branch of government has only ministerial control over grants of immunity.[3] In *Pillsbury v. Conboy*, 459 U.S. 248, 261, 262 (1983), the

[3] See *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977).

Court stated, "[n]o court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity. . . . Reliance on judicial exclusion of nonimmunized testimony would be inconsistent with the congressional policy of leaving the granting of immunity to the Executive Branch." Other state and federal courts have endorsed the ideas espoused in *Pillsbury*, if not expressly by name, and stated why the court inserting itself into the propriety of the immunity grant is prohibited. The key issue for the courts is the fact that "the judiciary is usurping the executive's ability to grant use immunity." *In re Candiotti*, 729 F.Supp. 840, 843 (S.D. Fla. 1990).

The most recent case to discredit the practice of judicial grants of immunity was the Appellate Court of Connecticut case of *Morant v. State*, 68 Conn. App. 137, 165 (2002). The Connecticut statute "authorizes the prosecution to grant immunity to state witnesses under certain circumstances." Furthermore, the Connecticut Supreme Court "has explicitly held that [the immunity statute] confers no such authority upon the courts with regard to defense witnesses." *Id.* Indeed the court has held repeatedly that there is no authority, statutory or otherwise, enabling a trial court to grant immunity to defense witnesses.

The foregoing illustrates that judicial interference in a traditionally executive function implicates the separation of powers doctrine. In this regard, the

Petitioner notes the aversion this Court has to settling issues that come out of state separation of powers concerns.[4] Nevertheless, Petitioner believes that a separation of powers argument is still appropriate for this Court to consider in this case. The Ohio Supreme Court, in *State v. Hochhauser*, 76 Ohio St. 3d 455, 464, 668 N.E.2d 457, 446 (1996), cited as authority on a separation of powers issue Justice Cardozo's majority opinion in this Court's case of *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936). Thus, the Ohio court is using federal law to resolve the separation of powers issue. In accordance with *Michigan v. Long*, 463 U.S. 1032 (1983), this Court may hear a separation of powers argument solely on its own merits, not dependent on the Fifth Amendment issue the Ohio Supreme Court raises in *Reiner II*, because the Ohio Supreme Court is relying on federal law to settle this issue.

Apart from a separation of powers argument, however, a federal question is still presented to this Court due to the manner in which the Supreme Court of Ohio has ignored the constitutional fabric of immunity and tipped the scales balancing immunity and the privilege against self-incrimination. In doing so, the Ohio court has hindered the government's prosecution of any single-culprit crimes and injected the judiciary into an area beyond its expertise.

As this Court noted in *Ohio v. Reiner*, 532 U.S.

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[4] See, for example, *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("[t]he Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States."); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

17 (2001), the Fifth Amendment protections apply to even those who are not guilty. Therefore, a state prosecutor may (through the Fifth Amendment as interpreted by statute or case law) grant immunity to someone who maintains his innocence. In this case, the testimony of a witness who consistently denied all culpability could not have been put in front of the jury any other way aside from a grant of immunity because she validly asserted her Fifth Amendment privilege. Although the defense was pointing to the witness as the guilty party, the prosecutor was in the best position to determine whom to prosecute and whether or not the presentation of the government's case required a grant of immunity to procure needed testimony.

Courts are very clear in ruling that immunity is not a task congenial to the judicial function. As noted by the United States Court of Appeals for the Second Circuit:

> [A] court cannot determine whether any constitutional provision requires a judicial grant of use immunity without assessing the implications upon the Executive Branch, both those that flow from a grant of use immunity and those that flow from an adjudication of whether such immunity might be appropriate in a particular case. The concerns previously expressed about the risk to other successful prosecutions are matters normally better assessed by prosecutors than by judges. Surely a court is in no position to weigh the public interest in the com-

> parative worth of prosecuting a defendant or his witness....

United States v. Turkish, 623 F.2d 769, 776 (2nd Cir. 1980).

State courts have also come to the same conclusion. The Supreme Court of Colorado, en banc, in *Harding v. People*, 708 P.2d 1354, 1357-1358 (Colo. 1985) stated:

> Court-granted use immunity also involves significant costs to the truth-finding process. A trial judge would have to examine the circumstances surrounding the government's investigation of the case and assess possible harm to the public interest caused by a grant of immunity. "Such collateral inquires *(sic)* would necessitate a significant expenditure of judicial energy, possibly to the detriment of the judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial." *United States v. Thevis*, 665 F.2d 616, 640 (5th Cir. 1982).

The Court of Appeals of Florida, Third Circuit in *State v. Montgomery*, 467 So. 2d 387, 394 (Fla. Dist. Ct. App. 1985) summarized the concerns.

> Courts have recognized that an immunity decision would require a trial judge to examine pre-trial all the facts and circumstances surrounding the government's investigations in order to properly assess the possible harm to public interests of an immunity grant. These collateral inquiries, it

> has been postulated, would necessitate significant expenditures of judicial energy to the detriment of the judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial. *Thevis*, 665 F.2d at 640. See *Turkish*, 623 F.2d at 776-77. For these reasons, it is generally held that the balancing of interests concerning who and when to prosecute should be left to the executive branch. *United States v. Chagra*, 669 F.2d 241, 261 (5th Cir.), *cert. denied*, 459 U.S. 846, 103 S. Ct. 102, 74 L. Ed. 2d 92 (1982). See also *Thevis; Turkish*.

Indeed, intervention of the judiciary in the immunity decision would require clairvoyance by the trial court. It is impossible to know what a witness will say on the stand after a grant of immunity until immunity is granted. Just as the Court cannot ask witnesses why they choose to assert their Fifth Amendment privilege not to incriminate themselves, the Court cannot likewise ask a witness, "If the Court grants you immunity, what will you say?" to determine whether immunity is proper. That action by the Court would violate the privilege that the Fifth Amendment was designed to protect. It follows, therefore, that the Court cannot inject itself into the consideration of whether a pending grant of immunity is proper.

Thus, the search for the truth that the Ohio Supreme Court espouses in *Reiner II* actually hampers the process because the trial court, through some mystical process, must now somehow deter-

mine guilt or innocence before any facts are even presented to it. If any advantage is gained by the Court taking control of the immunity granting process, it is lost by the abrogation of the purpose of immunity as a tool for the prosecution.

Finally, it is significant that the holding of the Supreme Court of Ohio in *Reiner II* negatively impacts the witness who asserted her Fifth Amendment right against self-incrimination, in at least two ways. First, if a prosecutor grants immunity pursuant to Ohio Rev. Code Ann. § 2945.44 (Anderson 2001)(Appendix 23-24) to a witness who has asserted the privilege, the government is precluded from prosecuting that witness for the crime under consideration. By holding that it is never proper for the government to grant immunity to a witness who claims innocence, but whom the defense asserts is the culprit, the Ohio court necessarily concluded that all such persons should remain indefinitely under the threat of prosecution, as if under the Sword of Damocles.

In addition, it requires no citation to authority that many persons who profess their innocence, yet assert a Fifth Amendment privilege, wish to testify under a grant of immunity in order to negate the public perception that they are guilty or, at least, have something to hide. In the instant case, nanny Susan Batt consistently professed her lack of culpability for Alex Reiner's death. She asserted her Fifth Amendment privilege only on the advice of counsel, who was no doubt concerned with the fact that the defense was claiming that Batt, and not the defen-

dant, had committed the crime. Susan Batt likely wished to testify under oath in order to tell her side of the story. Without a grant of immunity, she would, as a practical matter, be precluded from doing so. The present holding of the Ohio Supreme Court has now ensured that she would be convicted by many people in the court of public opinion, regardless of the outcome in a court of law.

B. The Only Person Benefitted By The Holding Of The Supreme Court Of Ohio Is The Defendant, Who Was Not Even A Party With Standing To Challenge The Grant Of Immunity By The Prosecutor To The Witness.

Initially, it should be noted that the defendant was not prejudiced by a grant of immunity to a witness in this case, notwithstanding the view of the Ohio Supreme Court to the contrary. The grant of immunity did not have the effect of either telling the jury that the witness's testimony (denying culpability) was worthy of belief or directing a verdict against the defendant. As the Delaware Supreme Court held in an analogous situation:

> The defendant's second argument is likewise fruitless: that the grant of immunity, in effect, constituted either a directed verdict or an impermissible comment on the evidence by the Trial Judge. This argument is premised on the evidence that either Hall or the defendant fired the fatal shot. Defendant

contends that by granting immunity to Hall, the Trial Judge impelled the jury to find the defendant guilty. This argument assumes that the jury was impelled to find someone guilty. Of course, there is nothing to support this speculation. Moreover, the Trial Court's clear instruction to the jury that it had the option to find the defendant "not guilty" vitiates the argument that the grant of immunity constituted a directed verdict. Alternately, defendant argues (without any supporting authority) that by granting immunity, the Trial Judge in effect told the jury that he believed that the defendant, rather than Hall, was guilty. According to the argument, this constitutes an impermissible comment on the evidence in violation of Del.Const.Art. 4, §§ 19, Del.C.Ann. We do not agree. Historically, a grant of immunity does not fall within the ambit of impermissible comment upon the evidence. In *McFeat v. Philadelphia, W. & B.R.Co.*, Del.Supr., 69 A. 744 (1908), it was stated that while such comments by the Trial Judge "were made in the presence of the jury, they were not addressed to the jury, and therefore the provision of the Constitution [Art. 4, §§ 19 (then §§ 22)] * * * has no application." (69 A. at 746) In any event, we are of the opinion that the effect of any statement by the Trial Court in this connection was cured by its instruction to the jury that they were the

> sole and exclusive judge of the facts, and that they had the option to find the defendant not guilty. *Seeney v. State,* Del.Supr., 211 A.2d 908 (1965); *State Highway Department v. Buzzuto,* Del.Supr., 264 A.2d 347 (1970). We find no reversible error in the grant of immunity to Kevin Hall or the manner in which it was handled by the Trial Court.

Jenkins v. State, 305 A.2d 610, 614 (Del. 1973).

This result is in keeping with the overall function and effect of immunity. While the Ohio Supreme Court mistakenly sensed that Ms. Batt's immunity was a *de facto* implication of the defendant's guilt, every other case to review such a claim has rejected it. See, for example, *United States v. First Western Bank,* 491 F.2d 780, 783 (8th Cir. 1974) ("[I]mmunity does not clothe the witness with any aura of innocence....").

Although not harmed by a grant of immunity, the defendant in this case stands to benefit from the holding of the Supreme Court of Ohio denying the government its right to grant immunity to the witness. The government is precluded from adducing the testimony of a witness crucial to its prosecution. In addition, the Ohio Supreme Court also held in this case that the defendant should be able to call the witness so that she could assert her Fifth Amendment privilege in front of the jury. This would have no other effect than to aid the defendant in casting blame on the witness, despite the true lack of inference of guilt that an assertion of the privilege should have.[5]

[5] The detriment to the government's due process rights from this specific holding of the Ohio Supreme Court is addressed more fully in the second topical heading, *infra.*

Indeed, the opinion of the Ohio court runs the significant risk of turning an historically "prosecutorial tool" into a defense ploy. The opinion suggests that an "either/or" situation ("single-culprit crime") can exist whenever a defendant accuses another of the crime. If this is sufficient, then a defendant in Ohio, following the *Reiner II* decision, can preclude the testimony of any witness who asserts a Fifth Amendment privilege by claiming that the witness is, or could be, the true perpetrator. In effect, the defendant in these "either/or" crimes becomes the chief arbiter of whether a witness gets immunity. See 8 Wigmore, Evidence § 2282, at 519 (McNaughton rev. 1961).

Ironically, the criminal defendant in this case, and other defendants similarly situated, stand to gain these benefits despite the fact that a defendant lacks standing to even challenge a prosecutor's grant of immunity to a witness.[6] The basic requirement of standing, of course, is well established, as Justice Holmes stated:

> [U]nless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the

[6] By failing to address on appeal the argument put forth by the State of Ohio that defendant Reiner lacked standing to challenge the government's grant of immunity to Susan Batt, the Supreme Court of Ohio implicitly ruled that the defendant had standing to challenge the grant of immunity.

> position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. *Supervisors v. Stanley*, 105 U.S. 305, 311; *Clark v. Kansas City*, 176 U.S. 114, 118; *Lampasas v. Bell*, 180 U.S. 276, 283, 284; *Cronin v. Adams*, 192 U.S. 108, 114.

New York, ex rel. Hatch v. Reardon, 204 U.S. 152, 160 (1907). See also, *Jones v. United States*, 362 U.S. 257, 261 (1960).

The statutory procedure for a grant of immunity is designed to accommodate the witness's rights and the State's need for evidence. The statute is simply not addressed to the interests of defendants. Accordingly, a defendant is not a member of the class primarily protected by the immunity statute. A defendant, therefore, does not have the right to protest a grant of immunity because he is not a party in interest. See *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Courts have repeatedly imposed standing requirements in this exact context. As the Supreme Court of Appeals of West Virginia stated in *State v. Pennington*, 179 W.Va. 139, 146, 365 S.E.2d 803, 810 (1987), "[t]he defendant, however, in that criminal proceeding may not assert irregularities in regard to the granting of that immunity from prosecution." In *Smith v. Commonwealth*, 386 Mass. 345, 349, 350, 436 N.E.2d 377, 379, 380 (1982), the Supreme Judicial Court of Massachusetts ruled "without qualification, that a defendant 'has no standing to argue that the testimony of . . . purportedly immunized witnesses [are] the product of improper grants of immunity.'

Commonwealth v. Simpson, 370 Mass. 119, 121 (1976)." The *Smith* court later stated, "[T]he privilege against self-incrimination is a personal right of the witness, and one that the witness is in a position to protect by his own means. *Commonwealth v. Simpson, supra. Goldstein v. United States*, 316 U.S. 114, 121 n.11 (1942)." *Smith* closes its analysis with this telling rejoinder appropriate in this case: "In sum, the defendant has not established that the grant of immunity . . . affected him in any way other than making available her testimony against him." *Smith, supra.*, at Mass. 350, N.E.2d 380.

II. The Government's Due Process Rights Are Violated When It Is Precluded From Granting Immunity To A Witness, Yet The Criminal Defendant Is Permitted To Call That Same Witness To The Stand For The Sole Purpose Of Asserting A Fifth Amendment Privilege Against Self-Incrimination In Front Of The Jury.

This Court has ruled that the people of the state have due process rights equal to that of the criminal defendant. Justice Jackson, writing for this Court in *Stein v. New York*, 346 U.S. 156, 197 (1953), overruled on other grounds in *Jackson v. Denno*, 378 U.S. 368, 391 (1964) stated: "The people of the State are also entitled to due process of law."

Justice Jackson's ruling has been followed by both state and federal courts.[7] Indeed, the state of California has gone so far as to incorporate the due process rights of the people of the state in its constitution. CAL. CONST., art. I, § 29. In *People v. Snyder*, 218 Cal. App. 3d 480, 492 (1990), the Court of Appeal of California, Fourth Appellate District stated: "The People are entitled to the same judicial impartiality, fairness and due process rights as defendants (*People v. Beasley* (1970) 5 Cal. App. 3d 617, 630 [85 Cal. Rptr. 501]; *People v. Arline* (1970) 13 Cal. App. 3d 200, 205 [91 Cal. Rptr. 5201]; *Department of Corrections v. Superior Court* (Ayala) (1988) 199 Cal. App. 3d 1087, 1092 [245 Cal. Rptr. 293]) so long as such equality of treatment does not otherwise trample on the special constitutional protections accorded criminal defendants." This same court later ruled: "Even before Proposition 115 formalized the People's due process rights, it was recognized that both parties in a criminal action were entitled to due process." *Alford v. Superior Court*, 89 Cal. App. 4th 356, 378, fn. 20 (2001).

In the instant case, the government's due process rights have been, and will be, violated by the holding of the Supreme Court of Ohio in *Reiner II*. The Ohio court judicially created a "super-privilege" for witnesses who assert the Fifth Amendment in

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[7] See, for example, *United States, ex rel. Cooper v. Denno*, 221 F.2d 626, 629 (2nd Cir. 1955); *Smith v. United States & Bowden v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963); *Haas v. United States*, 344 F.2d 56, 66 (8th Cir. 1965); *People v. Dennis*, 177 Cal. App. 3d 863, 873 (1986). See also *Coleman v. Balkcom*, 451 U.S. 949, 960 (Rehnquist, J., dissenting)(1981) (citing expressly to Justice Jackson's language in a dissent from certiorari being denied).

single-culprit crimes (the "either/or" situation) upon whom the defense is attempting to cast blame, and it then precluded these same witnesses from being granted immunity by the government. In doing so, the court has precluded the government from adducing the testimony of a witness crucial to its prosecution. In addition, the holding of the Ohio Supreme Court turns the power to grant immunity on its head by placing more power in the hands of a criminal defendant to determine if immunity is proper than is afforded to the government.

As importantly, the Ohio court has prejudiced the government to the point of denying it due process by holding that the defendant should be permitted to call the recalcitrant witness to the stand for the sole purpose of invoking her Fifth Amendment privilege in front of the jury. As the Ohio Supreme Court expressly stated:

> Here, the prosecution did not have two potentially culpable persons. Instead, this was an either/or situation. Either Reiner was guilty or Susan Batt was guilty. The government chose to indict Reiner and claimed that there was insufficient evidence to indict Batt. Batt continually claimed her innocence. However, immunity is not appropriate in the either/or situation; it could actually hinder the search for truth. ***The jury should have been permitted to hear Batt take the Fifth Amendment and to evaluate her testimony on that basis.*** The defense would have been able to present its

> theory of the babysitter's culpability without the court's giving the jury the impression that Batt was immune from prosecution because she did not commit the crime. Therefore, it did not further the administration of justice when the trial court agreed to grant her immunity from future prosecution. Instead, it severely prejudiced the rights of the defendant.

Reiner II, 93 Ohio St.3d at 605, 757 N.E.2d at 1146 (Appendix 7-8) (emphasis added).

Such a practice would be at odds with the rulings of any court that has ever reviewed this question. The most frequently cited case that states that neither side may call a witness for the sole purpose of making him "take the Fifth" in front of the jury is *Bowles v. United States*, 439 F.2d 536, (D.C. Cir. 1970). This case was an *en banc* review of a conviction where the trial judge prohibited the defense from calling a witness to the stand whom all parties knew would assert his Fifth Amendment right to not incriminate himself. The Court stated that having a witness take the privilege against self-incrimination in front of the jury created an improper inference to the jury, and it was, by its nature, inequitable to the parties:

> It is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense. *Billeci v. United States*, 87 U.S.App.D.C. 274, 184 F.2d

> 394 (1950). The rule is grounded not only in the constitutional notion that guilt may not be inferred from the exercise of the Fifth Amendment privilege but also in the danger that a witness's invoking the Fifth Amendment in the presence of the jury will have a disproportionate impact on their deliberations. The jury may think it high courtroom drama of probative significance when a witness "takes the Fifth." In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination. *Fletcher v. United States,* 118 U.S.App.D.C. 137, 332 F.2d 724 (1964). An obvious corollary to these precepts is the rule that a witness should not be put on the stand for the purpose of having him exercise his privilege before the jury. See *Fletcher v. United States, supra.* This would only invite the jury to make an improper inference. For the same reason no valid purpose can be served by informing the jury that a witness has chosen to exercise his constitutional privilege. That fact is not one the jury is entitled to rely on in reaching its verdict.

Bowles, supra., at 541-542.[8]

[8] Scores of other courts have echoed this rationale. See, e.g., *United States v. Beye,* 445 F.2d 1037 (9th Cir. 1971); *United States v. Johnson,* 488 F.2d 1206 (1st Cir. 1973); *United States v. Lacouture,* 495 F.2d 1237 (5th Cir. 1974); *People v. Dikeman,* 192 Colo. 1, 555 P.2d 519 (1976); *People v. Myers,* 35 Ill. 2d 311, 220 N.E.2d 297 (1966); *State v. Berry,* 324 So. 2d 822 (La. 1975); *People v. Thomas,* 51 N.Y.2d 466, 415 N.E.2d 931 (1980); *Commonwealth v. Greene,* 445 Pa. 228, 285 A.2d 865 (1971).

In *Gray v. State*, 137 Md. App. 460, 769 A.2d 192 (2001), the Court of Special Appeals of Maryland, like others, looked at the damage of an improper inference made by the jury when a witness takes the stand and merely "takes the Fifth." The Court also found great fault with witnesses "taking the Fifth" for "high courtroom drama." Citing *Bowles*, Gray goes on to state: "The court noted that the risk that the jury would put undo *(sic)* emphasis on a witness's act of invoking the Fifth Amendment is especially great given that the witness is not subject to cross-examination and need not justify, at least to the jurors, the grounds for the claim of privilege." *Id.*, at Md. App. 510, A.2d 221. The crux of the holding is found later: "Generally speaking, the courts that have held that the practice of calling a witness before the jury, knowing that he will invoke the Fifth Amendment privilege, ***is strictly prohibited, even when it is the defense that seeks to do so***, have relied on the majority opinion in *Bowles* and have reasoned, as did that court, that the invocation of the privilege simply lacks probative value." *Id.*, at Md. App. 512, A.2d 221 (emphasis added).

Gray involved a "single-culprit crime." The idea of a "single-culprit crime" in *Gray* is the same thing as the "either/or" proposition in *Reiner II*. Viewing this specifically, the *Gray* Court stated: "Whatever questionable probative value there was in having the witness assert the privilege in front of the jury was entirely outweighed by the substantial danger of unfair prejudice that would have resulted." *Id.*, at Md. App. 517, A.2d 225. The Court concluded the argument by stating that when a defendant "chooses

to put on a defense that casts blame on another person, however, he should not be permitted to construct a scenario of criminal wrongdoing by that person based solely upon adverse inferences drawn from the person's assertion of the Fifth Amendment privilege." *Id.*, at Md. App. 517-518, A.2d 225.[9]

The Ohio Supreme Court in its *Reiner II* is providing for the defendant the "high courtroom drama" and improper inferences in front of the jury which *Bowles* and its progeny expressly prohibit. By way of contrast, this Court has underscored the sanctity of the Fifth Amendment. For example, *Slochower v. Board of Higher Education of New York*, 350 U.S. 551 (1956) and *Grunewald v. United States*, 353 U.S. 391 (1957) stand for the rule that a witness asserting the privilege to not incriminate himself cannot be imputed to mean that the witness is guilty or have some other sinister meaning. *Johnson v. United States*, 318 U.S. 189 (1943) stands for the rule that neither party should be harmed by witnesses or the defendant asserting the Fifth Amendment privilege. *Namet v. United States*, 373 U.S. 179 (1963) stands for the rule that a party cannot use the taking of the Fifth Amendment in front of the jury to create an improper inference for the jury.

Most importantly for the present discussion, the holding of the Supreme Court of Ohio rises to the level of denying the State of Ohio the due process it deserves when engaged in a criminal prosecution. For this reason alone, the writ should be granted.

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[9] The opinion in *Gray*, moreover, shows how analogous that case is to *Reiner II:* "In the case at bar, *Gray* was attempting to do just that. The evidence that he presented to show that Gatton had murdered Bonnie was at best thin (which probably explains why the State had chosen to prosecute him, not Gatton)." *Id*, at Md. App. 518, A.2d 225.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLANT AND CROSS-APPELLEE, v. REINER, APPELLEE AND CROSS-APPELLANT.

[Cite as *State v. Reiner* (2001), 93 Ohio St.3d 601.]

(Nos. 99-239 and 99-427 - Submitted October 2, 2001 - Decided November 28, 2001.)

APPEAL and CROSS-APPEAL from and CERTIFIED by the Court of Appeals for Lucas County, No. L-97-1002.

UPON REMAND from the United States Supreme Court.

LUNDBERG STRATTON, J. Matthew Reiner was convicted by a jury of involuntary manslaughter for the death of his two-month-old infant son, Alex Reiner. Alex died as a result of "shaken baby syndrome." In *State v. Reiner* (2000), 89 Ohio St.3d 342, 343-345, 731 N.E.2d 662, 666-667, the court set forth the underlying facts of this case:

"On June 15, 1995, Deborah S. Reiner gave birth to twin boys named Alex and Derek. Both boys were premature at birth but otherwise healthy. The Reiners also had a two-year-old daughter named Amy. Following the birth of the twins, both parents took time off from work to care for them. Matthew Reiner took leave from his job as an engineer from June 15 to July 25, 1995. Deborah Reiner, a dentist, did not return to work until August 14, 1995.

"The Reiners hired a full-time babysitter, Susan Batt, age twenty-four, to care for their three

children. Susan Batt began working on July 25, 1995, under Deborah Reiner's supervision while Susan Batt became acclimated to the family. During the first week of Susan Batt's employment, Deborah Reiner spent most of her time at home. In the final two weeks before Deborah Reiner returned to work, she left the home on several occasions with Amy, leaving Susan Batt alone with the twins. Susan Batt became the full-time exclusive childcare provider on August 14, 1995.

"Over a period of two weeks, the following events occurred. Alex became ill the weekend of August 12, 1995. He appeared to be achy and vomited several times. Deborah Reiner called the pediatrician and then took Alex to an outpatient clinic on Sunday, August 13. The clinic doctor diagnosed stomach flu and recommended that Deborah Reiner give Alex Pedialyte.

"By Wednesday, August 16, 1995, Alex had improved and appeared to have recovered. The twins' pediatrician performed a well-care examination of both boys that day. The results were unremarkable.

"Deborah Reiner stayed home with the children on Wednesday, August 23, 1995, her regular day off. Alex seemed achy that day but had no fever. On Thursday, August 24, 1995, Susan Batt telephoned Matthew Reiner at work and reported that Alex had vomited in the morning. He told her to give Alex some Pedialyte. On Friday, August 25, Susan Batt telephoned Deborah Reiner at work to report that

Alex had vomited. Deborah Reiner's mother came over Friday afternoon to help care for the children. Alex remained ill and vomiting over the weekend, still with no fever.

"On Monday, August 28, 1995, when Deborah Reiner returned home after work, Susan Batt reported that Alex had eaten well and taken two five-hour naps that day. He appeared achy but did not have a fever, and Susan Batt had given him Tylenol. Susan Batt left the Reiners that evening between 5:30 and 6:00 p.m. Later that evening, Deborah Reiner's parents stopped by to drop off Amy, who had spent the day with them. They stayed and visited until 7:30 p.m. when Matthew Reiner arrived home.

"Alex vomited again that evening at 9:00 p.m. The couple put the twins to bed at approximately 10:30 that night. Later, they heard Alex whimpering. Matthew Reiner took Alex downstairs. He claimed that he laid Alex on his (Matthew's) chest to try to get the baby comfortable and to fall asleep. Within a half hour, Alex's breathing became labored and he became unresponsive. Matthew Reiner took Alex to his bedroom to awaken his wife. She could not get Alex to respond, so Matthew Reiner called 911.

"When emergency personnel arrived, Alex had no pulse and was not breathing. His skin was blue. They transported Alex to a nearby hospital, where he was placed on a respirator. Two days later, on August 30, 1995, Alex was removed from life support and died.

"Dr. James Patrick, Lucas County Coroner, performed an autopsy. He concluded that Alex had

died from 'shaken baby syndrome.' Dr. Patrick estimated that the time of injury was the evening of Monday, August 28, 1995, most likely within minutes of the onset of respiratory arrest when Matthew Reiner had been alone with Alex, but at most, within two to three hours of the onset.

"A grand jury indicted Matthew Reiner for involuntary manslaughter. The case proceeded to trial. The key issue at trial was the timing of the fatal trauma to Alex. The defense theory was that Susan Batt, not Matthew Reiner, was the culpable party. The defense presented evidence that all three Reiner children had been healthy from birth until the weekend of August 11, 1995, after Susan Batt became employed. Deborah Reiner testified that her children had no medical problems from the time of Alex's death until the trial, after Susan Batt left the Reiners' employ. Deborah Reiner also testified that no other family members had contracted a stomach virus or suffered symptoms similar to Alex's during the last two weeks of August despite their close proximity to Alex, in particular his twin, Derek, who slept in the same crib. There also was evidence of additional injuries to Alex and injuries to Derek. A hospital radiologist testified that x-ray films of Alex taken at the hospital on August 29, 1995, indicated a broken rib and broken leg. Subsequent x-rays of Derek indicated that he suffered from three broken ribs."

The Reiners' babysitter, Susan Batt, was subpoenaed by both the prosecution and the defense. Upon advice of counsel, she invoked her Fifth Amendment privilege against self-incrimination and

refused to testify. She had also invoked her Fifth Amendment privilege while testifying in the juvenile court proceeding. Batt's counsel informed the court that she would not testify unless granted full immunity from prosecution.

The prosecutor acknowledged that Batt was not the subject of any criminal investigation. The prosecutor questioned whether a grant of immunity was applicable in this case, since during the investigation Batt had clearly indicated she lacked culpability. Nevertheless, Batt's counsel insisted that Batt would assert her Fifth Amendment rights if called to testify by either the prosecution or the defense. Consequently, the prosecution requested that the court grant Susan Batt transactional immunity pursuant to R.C. 2945.44 and compel her to testify.

The court heard arguments from the defense, as well as from counsel for Deborah Reiner and the guardian *ad litem* for the Reiners' children that a grant of immunity to Batt would not further the administration of justice. The court, however, decided that Batt's testimony should be available and granted her transactional immunity. Susan Batt subsequently testified and denied all culpability. She explained to the jury that she had refused to answer questions without a grant of immunity upon the advice of counsel although she had done nothing wrong.

On September 23, 1996, a jury convicted Matthew Reiner of involuntary manslaughter. Matthew Reiner appealed his conviction to the Lucas County Court of Appeals. The appellate court

affirmed the trial court's grant of transactional immunity to Susan Batt. *State v. Reiner* (Dec. 18, 1998), Lucas App. No. L-97-1002, unreported, 1998 WL 879833.

State v. Reiner (2000), 89 Ohio St.3d 342, 731 N.E.2d 662 (*"Reiner I"*), affirmed in part, reversed in part, and remanded to the trial court for a new trial consistent with the court's opinion. *Reiner I* concluded that the trial court had wrongfully granted immunity to Susan Batt. *Reiner I* held that the grant of immunity was unlawful because Batt lacked a valid Fifth Amendment privilege against self-incrimination, and it seriously prejudiced the rights of the defendant. *Id.* at 355, 731 N.E.2d at 675.

The United States Supreme Court reversed *Reiner I* to the extent that the opinion held that Batt lacked a valid Fifth Amendment privilege. *Ohio v. Reiner* (2001), 532 U.S. 17, 121 S.Ct. 1252, 149 L.Ed.2d 158. The United States Supreme Court held that Batt had "reasonable cause" to apprehend danger from her answers if questioned at trial, although she denied any involvement in the abuse of the Reiner children. *Id.* at ___, 121 S.Ct. at 1255, 149 L.Ed.2d at 162-163. The court reasoned that Batt spent extended periods of time alone with Alex in the weeks before his death. She was with him within the potential time frame of the fatal trauma. The defense theory was that Batt was responsible for the baby's death. Under these circumstances, it was reasonable for Batt to fear that her answers to some questions might tend to incriminate her. The Supreme Court stated, "We do not, of course, address the question whether

immunity from suit under § 2945.44 was appropriate." *Id.* at ___, 121 S.Ct. at 1255, 149 L.Ed.2d at 163. The Supreme Court then remanded for further proceedings consistent with its opinion.

Pursuant to *Ohio v. Reiner*, we reverse *Reiner I* to the extent that it held that Batt lacked a valid Fifth Amendment privilege against self-incrimination. Nevertheless, we affirm our decision in *Reiner I* that the grant of immunity to Batt resulted in serious prejudice to the defendant and did not further the administration of justice. R.C. 2945.44.

Immunity is a prosecutorial tool utilized to fulfill the government's need for testimony. *State ex rel. Leis v. Outcalt* (1982), 1 Ohio St.3d 147, 149, 1 OBR 181, 183, 438 N.E.2d 443, 446. The government typically requests that immunity be granted to a witness who is culpable to some extent but whose testimony will also implicate a defendant. Usually the witness's involvement in the situation is of a lesser nature. The government is willing to forgo prosecution of the less culpable witness in order to obtain testimony that is necessary to successfully prosecute the defendant.

Here, the prosecution did not have two potentially culpable persons. Instead, this was an either/or situation. Either Reiner was guilty or Susan Batt was guilty. The government chose to indict Reiner and claimed that there was insufficient evidence to indict Batt. Batt continually claimed her innocence. However, immunity is not appropriate in the either/or situation; it could actually hinder the search for truth. The jury should have been permit-

ted to hear Batt take the Fifth Amendment and to evaluate her testimony on that basis. The defense would have been able to present its theory of the babysitter's culpability without the court's giving the jury the impression that Batt was immune from prosecution because she did not commit the crime. Therefore, it did not further the administration of justice when the trial court agreed to grant her immunity from future prosecution. Instead, it severely prejudiced the rights of the defendant.

Therefore, we reverse our holding that Susan Batt lacked a valid Fifth Amendment privilege against self-incrimination; however, we affirm our holding that the trial court's grant of immunity severely prejudiced the rights of the defendant and did not further the administration of justice. Should the state retry the defendant, Batt may assert her Fifth Amendment right against self-incrimination.

Judgment accordingly.

DOUGLAS and F.E. SWEENEY, JJ., concur.

PFEIFER, J., concurs in judgment only.

MOYER, C.J., WOLFF and COOK, JJ., dissent.

WILLIAM H. WOLFF, JR., J., of the Second Appellate District, sitting for RESNICK, J.

COOK, J., dissenting. In *State v. Reiner* (2000), 89 Ohio St.3d 342, 731 N.E.2d 662 (*"Reiner I"*), a majority of this court reversed Reiner's conviction based on a belief that the trial court should not have granted transactional immunity to Susan Batt in order to compel her testimony. *Id.* at 352-356, 731 N.E.2d at 673-676. Because Batt had consistently

denied culpability for Alex Reiner's death, the *Reiner I* majority held that Batt lacked a valid Fifth Amendment privilege against self-incrimination and was therefore not entitled to immunity under R.C. 2945.44. *Id.* at 354, 731 N.E.2d at 674. The United States Supreme Court reversed *Reiner I* in a terse *per curiam* opinion that reiterated a longstanding principle of constitutional law: the Fifth Amendment protects the innocent and guilty alike. *Ohio v. Reiner* (2001), 532 U.S. 17, ___, 121 S.Ct. 1252, 1254, 149 L.Ed.2d 158, 162.

Faced with the United States Supreme Court's reversal, this court has no choice but to recognize the validity of Batt's Fifth Amendment privilege against self-incrimination. Nevertheless, today's majority offers yet another rationale for reversing Reiner's conviction. Specifically, the majority holds that the trial court erred in granting Batt transactional immunity as a matter of Ohio law because the grant of immunity "did not further the administration of justice" and "severely prejudiced the rights of the defendant." The majority further opines that in this type of case-an "either/or situation," to use the majority's phrasing-immunity is an inappropriate obstacle to the "search for truth." For the reasons that follow, I dissent.

A trial court may not grant immunity under R.C. 2945.44 unless (1) the witness refuses to testify based on the privilege against self-incrimination, (2) the prosecutor makes a written request to order the witness to answer, and (3) the court informs the witness that he or she will receive transactional immuni-

ty. *State ex rel. Koren v. Grogan* (1994), 68 Ohio St.3d 590, 592, 629 N.E.2d 446, 448. Even if these three requirements are satisfied, the trial court may decline to grant immunity if "it finds that to do so would not further the administration of justice." R.C. 2945.44(A); see, also, *State ex rel. Leis v. Outcalt* (1982), 1 Ohio St.3d 147, 149, 1 OBR 181, 183, 438 N.E.2d 443, 446.

The majority concludes that the grant of immunity in this case did not "further the administration of justice" and was therefore unlawful. Assuming *arguendo* that Reiner ever had standing to challenge the grant of immunity to Batt (on this or any other basis), the majority's holding is inherently suspect for its failure to acknowledge our deferential standard for reviewing such determinations.[1] The decision whether a grant of immunity would further

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1. Some Ohio appellate courts have expressed the view that a criminal defendant lacks standing to challenge a grant of immunity to a witness. See, e.g., *State v. Steverson* (Sept. 15, 1998), Franklin App. No. 97APA11-1466, unreported, 1998 WL 634949; *State v. Minnich* (Sept. 30, 1997), Huron App. No. H-96-060, unreported, 1997 WL 614944. Similarly, numerous courts in other states have held that a defendant lacks standing to contest the grant of immunity to a prosecution witness. See *People v. Rodriguez* (Colo.1996), 914 P.2d 230, 266-267; Kerns v. State (Wyo.1996), 920 P.2d 632, 637; State v. Pierson (1988), 208 Conn. 683, 688, 546 A.2d 268, 270; *Smith v. Commonwealth* (1982), 386 Mass. 345, 348-349, 436 N.E.2d 377, 379; *State v. Ahmadjian* (R.I.1981), 438 A.2d 1070, 1078; *State v. Phillips* (1979), 297 N.C. 600, 606-607, 256 S.E.2d 212, 216; *Commonwealth v. Showers* (1996), 452 Pa.Super. 135, 153, 681 A.2d 746, 755; *People v. Wisely* (1990), 224 Cal.App.3d 939, 943-944, 274 Cal.Rptr. 291, 294; *State v. Kingbird* (Minn.App.1987), 412 N.W.2d 350, 354. A number of federal courts also take this view. See *United States v. Ellis* (C.A.3, 1979), 595 F.2d 154, 163; *United States v. Hathaway* (C.A.1, 1976), 534 F.2d 386, 402; *United States v. Foster* (C.A.7, 1973), 478 F.2d

the administration of justice lies within the sound discretion of the trial court. *State ex rel. Ney v. Niehaus* (1987), 33 Ohio St.3d 118, 119, 515 N.E.2d 914, 916. Accordingly, a reviewing court must not disturb the trial court's decision on this issue absent an abuse of discretion. See *id.*; *State v. Tomlinson* (1997), 125 Ohio App.3d 13, 18, 707 N.E.2d 955, 958. When applying this standard of review, an appellate court is not free to substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301, 1308. Rather, reversal on appeal is warranted only when the trial court has exercised its discretion unreasonably, arbitrarily, or unconscionably. *Id.*, citing *State v. Adams* (1980), 62

1001, 1003-1004; but, see, *Ellis v. United States* (C.A.D.C.1969), 416 F.2d 791, 799 (recognizing that defendant has standing to challenge grant of immunity "where the trial judge went outside his judicial province to grant immunity to a witness").

In *Reiner I*, the majority rejected the state's contention that Reiner lacked standing to challenge the grant of immunity to Batt. In doing so, the majority relied exclusively on its erroneous Fifth Amendment analysis:

"This argument [asserting a lack of standing] assumes that the grant of immunity met the statutory threshold of a valid privilege against self-incrimination. Because Susan Batt lacked a valid Fifth Amendment privilege against self-incrimination and the grant of immunity was unlawful, the state's standing argument lacks merit." *Reiner I*, 89 Ohio St.3d at 356, 731 N.E.2d at 675.

The *Reiner I* majority's standing analysis was inextricably intertwined with the Fifth Amendment analysis. Thus, the United States Supreme Court's reversal of *Reiner I* necessarily undermines this court's original resolution of the standing issue. The majority nevertheless decides the merits of the immunity issue in Reiner's favor without ever explaining how or why Reiner has standing under Ohio law to challenge the grant of immunity to Batt.

Ohio St.2d 151, 157, 16 O.O.3d 169, 173, 404 N.E.2d 144, 149.

With today's decision, the majority implicitly holds that the trial court acted unreasonably, arbitrarily, or unconscionably in granting immunity to Batt. But the record reveals anything but an abuse of discretion. Before deciding to grant immunity to Batt, the trial court heard extensive argument from the parties about whether immunity would further the administration of justice. The trial court also allowed (over the state's objection) the Reiner children's guardian *ad litem* and counsel representing Reiner's wife to offer their arguments opposing immunity for Batt. After hearing all of the arguments, the trial court concluded that the interests of justice were better served by granting R.C. 2945.44 immunity and compelling Batt's testimony. Although it recognized that this decision foreclosed any future prosecution of Batt for Alex Reiner's death, the trial court expressly focused its interests-of-justice inquiry on the "interests of this trial, this defendant and this prosecution." In the trial court's estimation, those interests demanded that the state be able to present "the testimony of one familiar with facts surrounding and preceding the incident," subject to full cross-examination and penalty for perjury. In other words, Batt's testimony furthered the administration of justice by aiding the jury's search for the truth about Reiner's guilt or innocence.

The majority cites nothing inherently unreasonable, arbitrary, or unconscionable about the trial court's method of deciding whether to grant transac-

tional immunity to Batt under R.C. 2945.44. While it is true that the grant of immunity to compel Batt's testimony could have resulted in a cruel twist of fate-Batt could have conceivably exculpated Reiner and inculpated herself without risk of being prosecuted-the trial court was not required to second-guess the prosecutor's discretionary decision to take that risk. See *United States v. Doe* (1984), 465 U.S. 605, 616, 104 S.Ct. 1237, 1244, 79 L.Ed.2d 552, 562-563 (noting that the decision to seek immunity "necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation"). The trial court acted well within its discretion in placing the interests of Reiner's trial at the forefront of its analysis. In finding otherwise, the majority simply substitutes its judgment for that of the trial court on the question of whether Batt's immunity furthered the administration of justice-a decidedly inappropriate approach for an appellate court reviewing a trial court's decision under an abuse-of-discretion standard. See *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 421, 674 N.E.2d 1159, 1164.

Even if it were appropriate to utilize a less deferential standard of review, the majority fails to provide a sound explanation of why it believes the trial court acted improperly by granting immunity to Batt. According to the majority, the grant of immunity in a case such as this one (the so-called "either/or situation") "could actually hinder the search for truth." Under the majority's reasoning, the search for

truth is better served by having a witness invoke his or her Fifth Amendment privilege against self-incrimination and *not testify at all.* This view is dubious in that it ignores the effect of a trial court's grant of immunity to a witness under R.C. 2945.44.

When the trial court grants immunity to a witness under R.C. 2945.44, the witness may no longer assert the Fifth Amendment privilege against self-incrimination; the trial court may validly compel testimony on matters that could have potentially incriminated the witness absent the grant of immunity. See, generally, *Kastigar v. United States* (1972), 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212. A grant of immunity thus *facilitates* the search for truth by allowing the jury to hear testimony from a witness who would otherwise refuse to testify based on the Fifth Amendment privilege. Moreover, a grant of immunity guarantees that a witness will be subject to cross-examination, " 'the greatest legal engine ever invented for the discovery of truth.' " *California v. Green* (1970), 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489, 497, quoting 5 Wigmore, Evidence (3 Ed.1940), Section 1367. It is for these very reasons that immunity statutes such as R.C. 2945.44 are "essential to the effective enforcement" of criminal laws and " 'part of our constitutional fabric.' " *Kastigar*, 406 U.S. at 447, 92 S.Ct. at 1658, 32 L.Ed.2d at 218, quoting *Ullmann v. United States* (1956), 350 U.S. 422, 438, 76 S.Ct. 497, 506, 100 L.Ed. 511, 524.

The majority fails to recognize the important and beneficial consequences of a grant of immunity and instead embraces a puzzling theory. Today's

decision essentially takes the view that no testimony whatsoever (i.e., when a witness invokes the Fifth Amendment) serves the search for truth better than full testimony subject to searching cross-examination (i.e., when the witness is granted immunity), at least in the so-called "either/or" situations. The majority's conclusion is all the more perplexing given its own recognition in this case that "[t]o 'further the administration of justice,' the jury should have been able to hear and evaluate all the evidence to decide whether someone other than Matthew Reiner was responsible for Alex's death." *Reiner I*, 89 Ohio St.3d at 356, 731 N.E.2d at 675. Despite the trial court's allowing the jury that very opportunity by compelling Batt's testimony under a grant of immunity, the majority curiously concludes that immunity somehow prejudiced Reiner's rights by impeding the search for truth.

The majority further supports its holding with the notion that Batt's immunity gave "the jury the impression that Batt was immune from prosecution because she did not commit the crime." The interests of justice would have been better served, in the majority's estimation, if the trial court had permitted the jury to "hear Batt take the Fifth Amendment and to evaluate her testimony on that basis." As a general proposition, however, the majority's analysis is questionable at best. It is unclear how a trial court's grant of immunity, in any situation, would give the jury an impression of the witness's innocence. A jury could-and more likely would-infer that a witness who is testifying under a grant of immunity was potentially culpable of some offense relating to the

subject matter of his or her testimony. Indeed, the very existence of immunity statutes "reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar*, 406 U.S. at 446, 92 S.Ct. at 1657, 32 L.Ed.2d at 218.

Moreover, the majority's view that the grant of immunity to Batt somehow acted as a declaration of her innocence fails to find support in the trial record. While Batt was on the witness stand, counsel for both parties repeatedly referred to Batt's having received immunity after having invoked her Fifth Amendment right against self-incrimination. On one occasion, the jury heard Reiner's counsel impeach Batt with the fact that she refused to testify until she received immunity:

"Q [by Reiner's counsel] Miss Batt, is it true that as late as yesterday morning you refused in this courtroom, where you were sitting then where you are now, to testify as a witness in this case pursuant to subpoena unless and until the State of Ohio through an Order of Her Honor, Judge Lanzinger, granted you immunity from prosecution for any criminal act or acts committed against any one or more of the Reiner children * * *?

"A [by Batt] Yes."

On yet another occasion, during recross-examination, the jury again heard Reiner's counsel inquire about Batt's refusal to testify until she received immunity from prosecution:

"Q You were unwilling, were you not, until

two days ago to come to this court to tell the truth * * * until and unless the Court granted you immunity from prosecution for the death of Alex and injuries to Derek; isn't that true?

"* * * [State's objection overruled.]

"A Yes."

Batt further admitted that she had invoked her Fifth Amendment right against self-incrimination during both Reiner's trial and a prior juvenile court proceeding. Thus, the jury learned (1) that Batt had invoked the Fifth Amendment in two different court proceedings relating to Alex's death and (2) that Batt had refused to testify at Reiner's trial until guaranteed immunity from prosecution. Given all the jury heard about the circumstances surrounding Batt's testimony, the majority's belief that the trial court somehow gave "the impression that Batt was immune from prosecution because she did not commit the crime" is profoundly misguided.

For the foregoing reasons, I decline to join the judgment of the majority and would instead find that the trial court did not abuse its discretion in granting R.C. 2945.44 immunity to Batt. This court's decision in *Reiner I* was unfortunate in that it committed an obvious error of constitutional law that the United States Supreme Court thought grievous enough to correct in a summary reversal. Today's decision may well be even more unfortunate, for the majority makes a mistake of Ohio law that no higher judicial authority can correct.

MOYER, C.J., and WOLFF, J., concur in the foregoing dissenting opinion.

Julia R. Bates, Lucas County Prosecuting Attorney, *John J. Weglian, J. Christopher Anderson and Craig T. Pearson*, Assistant Prosecuting Attorneys, for appellant and cross-appellee.

Fritz Byers; Cooper, Walinski & Cramer and *Richard S. Walinski; Robert Z. Kaplan* and *Samuel Z. Kaplan*, for appellee and cross-appellant.

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94 Ohio St. 3d 1434; 761 N.E.2d 49;
*2002 Ohio LEXIS 202, **

State v. **Reiner.**

99-239 and 99-427.

SUPREME COURT OF OHIO

94 Ohio St. 3d 1434; 761 N.E.2d 49; 2002 Ohio LEXIS 202

January 16, 2002, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

OPINION: RECONSIDERATION DOCKET

On motion for reconsideration. Motion denied.

Moyer, C.J., and Cook, J., dissent.

Resnick, J., not participating

Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Constitution of the United States
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or mili-

tary, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ohio Revised Code Ann. 2945.44 (Anderson 2001)
§ 2945.44 Immunity of witnesses turning state's evidence.

— Prior to 7-1-96

(A) In any criminal proceeding in this state or in any criminal or civil proceeding brought pursuant to sections 2923.31 to 2923.36 of the Revised Code, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:

(1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;

(2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

(B) If, but for this section, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he

complies with an order under division (A) of this section compelling him to give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order, he gave an answer or produced any information.

(C) A witness granted immunity under this section may be subjected to a criminal penalty for any violation of section 2921.11, 2921.12, or 2921.13 of the Revised Code, or for contempt committed in answering, failing to answer, or failing to produce information in compliance with the order.

Supreme Court, U.S.
FILED
MAY 20 2002

No. 01-1553

IN THE
Supreme Court of the United States

THE STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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Rule:

Supreme Court Rule of Practice 14.1(g)(i) 1

Respondent, Matthew Reiner, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari of Petitioner, the State of Ohio.

STATEMENT OF JURISDICTION

The Court lacks jurisdiction to decide the questions presented because the judgment below is based entirely on the Ohio Supreme Court's interpretation and application of an Ohio statute and involves no question or issue of federal law. 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is argumentative and incomplete, and the portion that purports to describe the opinion of the Ohio Supreme Court bears no relationship whatsoever to the actual opinion.[1] Hence, this Statement.

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1. For instance, Petitioner places quotes around the term "super privilege" and implies it is a quote from the Ohio Supreme Court's opinion. In truth, it is entirely the creation of Petitioner.

The Petition is likewise flawed in its wholesale failure to meet the explicit requirements of Supreme Court Rule of Practice 14.1(g)(i), designed to ensure that the Petition clearly shows "that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Nowhere does the Petition, which seeks review of a state-court judgment, specify (i) "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; (ii) the method or manner of raising them; (iii) the way in which they were passed on by those courts; or (iv) pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears.

(Cont'd)

This Court reversed an earlier judgment of the Ohio Supreme Court on the ground that the Ohio Supreme Court had erroneously held that a witness' assertion of innocence deprived her of her Fifth Amendment privilege against self-incrimination. *Ohio v. Reiner*, 532 U.S. 17, 22 (2001). In that opinion, this Court, of course, refrained, as it must, from addressing the purely state-law question of "whether immunity from suit under [Ohio Revised Code] § 2945.44 was appropriate." *Id.* And this Court remanded the case to the Ohio Supreme Court for consideration of that question.

The Ohio Supreme Court strictly followed the terms of the remand. In accordance with this Court's holding, the Ohio Supreme Court reversed its earlier judgment "to the extent that it held that [the witness] lacked a valid Fifth Amendment privilege against self-incrimination." *State v. Reiner*, 93 Ohio St. 3d 601, 604 (2001). The Court then turned to the state-law issue: whether the grant of immunity was proper under the controlling state statute.

The Court ruled it was not, because the grant did not "further the administration of justice" and therefore was not proper under the explicit terms of the statute. *Id.*

(Cont'd)

This failure is understandable, because, as shown in Section C., below, Petitioner has ereated its federal constitutional arguments out of whole, and exceedingly transparent, cloth, and has raised them in the Petition for the first time in this case.

REASONS FOR DENYING THE WRIT

A. The decision below is one solely of state law.

The Petition seeks review of a final judgment by the Ohio Supreme Court on a unique question of Ohio statutory law: the interpretation and application of the Ohio statute authorizing the grant, by a state court, of immunity to a witness in a state-court proceeding. Ohio Rev. Code Sec. 2945.44. States, of course, are "absolutely free" to interpret state law. *Arizona v. Evans*, 514 U.S. 1, 8 (1995) And this Court has "no power to revise judgments on questions of state law." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

The Petition strains, conspicuously, to conjure a federal constitutional question out of what is manifestly a pure state-law ruling. The Petition claims variously that the Ohio Supreme Court "amended" the Fifth Amendment, that the Ohio Supreme altered the "constitutionally-grounded" subject of governmental immunity by allowing for judicial review of prosecutor's decisions to grant immunity, and that, in doing these things, the Ohio Supreme Court somehow deprived the State of its right to due process.

These exaggerated claims are meritless. The text of the Ohio Supreme Court's decision makes clear that the court below limited itself to interpretation of the controlling state statute. "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 463, 89 L. Ed. 789(1945), citing *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636, 22 L. Ed. 429 (1874); *Berea College v. Kentucky*, 211 U.S. 45, 53, 29 S. Ct. 33, 34, 53 L. Ed. 81

(1908); *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 320, 61 L. Ed. 644 (1917); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S. Ct. 183, 80 L. Ed. 158 (1935).

As this Court has recently held, a state is free to make its own decisions regarding how best to address the various problems of law enforcement. *Arizona v. Evans, supra*, 514 U.S. at 8. In this instance, the Ohio immunity statute reflects the state legislature's considered judgment about the process by which immunity is to be granted in the state courts of Ohio. It is the province of the highest court of Ohio to make the definitive pronouncements regarding the meaning and application of that statute. And those pronouncements are not subject to this Court's revision. *Gurley v. Rhoden*, 421 U.S 200, 208 (1975); *Henry v. Mississippi*, *supra*, 379 U.S. at 447.

B. The Ohio immunity statute is unique.

The Petition claims that the Ohio Supreme Court has fundamentally disrupted the process by which government prosecutors grant immunity to witnesses whose testimony they seek. And the Petition supports this claim by citing federal precedents and decisions from several states — excluding Ohio.

Petitioner suggests that the Ohio Supreme Court has ignored both federal-court decisions about federal immunity statutes and state-court decisions about the immunity statutes of other states. Thus, Petitioner seems to suggest, the Ohio Supreme Court *must* be wrong about some overarching federal principle. This ploy reflects Petitioner's frantic search to find something other than a purely Ohio-law issue lurking in the Ohio Supreme Court's decision.

But Petitioner's effort is in vain. The Ohio immunity statute is unique in that, unlike its federal counterparts and, indeed, unlike its counterparts among the several states, it mandates judicial determination of whether an immunity grant sought by the State "furthers the administration of justice." Ohio Rev. Code Sec. 2945.44. If in the state court's view it does not, then an immunity grant is unlawful under the statute.

This express language in the Ohio statute, unlike any of the federal and state immunity statutes Petitioner seeks to compare, *requires* judicial review of the desire of prosecutors to grant immunity. Thus, the Petition's heavy reliance on federal and other state's authorities for the proposition that the judiciary lacks any authority to review immunity grants is utterly irrelevant. None of those statutes contains language requiring, or even permitting, a judicial determination, *before* immunity is granted, of whether immunity furthers the administration of justice, or is otherwise approrpriate. *See* 18 U.S.C. § 6002, interpreted in *Kastigar v. United States*, 406 U.S. 441 (1972); 18 U.S.C. § 6003, interpreted in *Pillsbury v. Conboy*, 459 U.S. 248 (1983), *McGee v. Crist*, 739 F.2d 505 (10th Cir. 1984) and Petitioner's other federal authorities; *see also* Connecticut General Statutes, Sect. 54-47(a), interpreted in *Morant v. State*, 68 Conn. App. 137 (2002).

In the precedents Petitioner relies on, the governing statute places with the prosecutor full, unreviewable authority regarding immunity grants. It is therefore not surprising that judicial decisions interpreting and applying those statutes have held that, as Petitioner construes it, "the court inserting itself into the propriety of the immunity grant is prohibited." Petitioner, at 8, citing *In re Candiotti*, 729 F. Supp. 840 (S.D. Fla. (1990) (interpreting 18 U.S.C. §§ 6002-6003).

But those cases, and the rule Petitioner derives, have nothing to do with this case. In the decision below, the Ohio Supreme Court did nothing more than rule dispositively "that the grant of immunity . . . resulted in serious prejudice to the defendant and did not further the administration of justice. R.C. 2945.44." *State v. Reiner*, 93 Ohio St. 3d 601, 604-05. This "is a question of state law on which only the Supreme Court of [Ohio] can speak with final authority." *See Alabama v. King & Boozer*, 314 U.S. 1, 9-10 (1941).

This ruling has no effect on the operation or application of the various federal immunity statutes or the immunity statutes of the several states. Its effect is limited to Ohio and the unique terms and conditions of Ohio's immunity statute.

C. The U.S. Constitution does not preclude a state legislature from providing for judicial review of grants of immunity; in any event, Petitioner's constitutional claims were not raised, briefed, or decided below.

The Petition strains mightily to conjure a constitutional issue out of what is manifestly a state-law issue. This is hard going, and the Petition eventually settles on the argument that a state prosecutor has a federal constitutional power (and, presumably, right) to grant immunity to whomever the prosecutor selects to receive it. *See* Petition, at 1, Reasons for Granting the Writ, first reason. From that shaky base, Petitioner argues that the Ohio Supreme Court's ruling "impermisssibly impinges" on that constitutional power. *Id.*, at 2. And Petitioner goes so far as to suggest that judicial review of immunity grants violates fundamental separation-of-powers doctrine. *Id.* at 8-9.

This argument reduces to a remarkable proposition: that the U.S. Constitution *prohibits* a state legislature from deciding, as a matter of public policy, that the judicial branch *of*

that state has the power to review prosecutorial grants of immunity. Therefore, the Petition argues, the Ohio statute, which empowers the judicial branch to review prosecutor's requests for immunity, and reject those that would not "further the administration of justice", is unconstitutional as an illegal infringement of the powers of the Executive Branch.

Stating the argument makes clear its invalidity. And if that weren't enough, one need only look at the actual content of Petitioner's separation-of-power argument. Petitioner acknowledges that the familiar separation-of-power considerations generally do not apply to state governments. *See* Petition, at 9 n.4, citing *Whalen v. United States*, 445 U.S. 684, 689 (1980). *See also Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers.") But Petitioner then argues that such considerations do warrant attention here. And it advances this argument on the sole ground that in a 1996 decision, having nothing to do with immunity, the Ohio Supreme Court cited an opinion by Justice Cardozo regarding separation of powers. From that citation, Petitioner invokes *Michigan v. Long*, 463 U.S. 1032 (1983), to the effect that if a state court invokes federal law to resolve an issue of state law, this Court may address the federal question involved.

This jumbled logic has several notable flaws. First, the Ohio Supreme Court in this case did not invoke federal law to resolve any issue. It decided the case entirely and solely on state-law grounds. Second, it is understandable that the Ohio Supreme Court did not look to federal law to resolve the issue before it, since the federal immunity statutes are fundamentally different from Ohio's, in that they do not require judicial review of the

appropriateness of immunity grants. *Compare Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) (where state and federal law are identical, state court's ruling may not be on independent and adequate state-law ground). Third, the Ohio Supreme Court in this case did not address any separation-of-powers issue, by reference to federal law or otherwise, because, among other reasons, no such issue was presented at anytime in the proceedings below.

Only in this Court, in this Petition, has Petitioner advanced its separation-of-powers argument. The argument is breathtaking in its novelty: that federal separation-of-powers doctrine prohibits the Ohio legislature from enacting an immunity statute providing for judicial review of prosecutors' requests for grants of immunity to witnesses.

The argument has no basis in law or logic. And it is not properly before this Court, because at no time in the state-court proceedings, and certainly not on remand following this Court's decision in *Ohio v. Reiner*, did Petitioner advance a claim, or explicitly or even by remote implication, that the Ohio immunity statute is unconstitutional. Therefore, even if the Petitioner's remarkable separation-of-powers contention had even facial plausibility — and it assuredly does not — the contention would not be a ground for issuance of the writ, since it was not raised, briefed, or decided in the proceedings below. *TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441, 451 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001).

D. A State is free to establish its own rules of standing to assert state-law rights in state-court proceedings.

Petitioner argues that the Ohio Supreme Court has somehow offended federal law by allowing Respondent to challenge the trial-court's decision to grant immunity in this case. *See Petition*, at 14-19.

This argument founders on the same inescapable fact that dooms Petitioner's earlier arguments: this is an issue of state law. A state Supreme Court's determination of standing to assert violations of state law is itself an issue solely of state law that is entirely and solely within the power of state courts to decide. This Court has long recognized that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

The Ohio Supreme Court is free to decide that the Ohio immunity statute, which involves a judicial determination of whether an immunity grant furthers the administration of justice, permits a defendant affected by such a grant to challenge that determination on appeal. Nothing in the U.S. Constitution could possibly deprive the Ohio Supreme Court of that freedom.

Petitioner's reliance on decisions from federal courts and the courts of other states likewise fails, because, as noted above, the statutes at issue in those decisions are different from Ohio's immunity statute. Other state courts are free to conclude whatever they wish about standing under their state statutes. And it might well be logical for them to conclude that a criminal defendant has no standing to challenge an

immunity grant where the governing statute vests absolute discretion in the prosecutor, as Petitioner repeatedly says those statutes do. But those statutes, and decisions under them, have nothing to do with this case.

The Ohio Supreme Court interpreted and appled a unique Ohio statute. In doing so, the Court decided that, under state law, a criminal defendant has standing to challenge an immunity grant on the ground that, in violation of the explicit language of the statute, the grant did not "further the administration of justice." This state-law determination is rational, and, in any event, it raises no federal question.

CONCLUSION

There is no ground for this Court's jurisdiction. The writ should not issue.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 6 2002
CLERK

(3)

No. 01-1553

IN THE

Supreme Court of the United States

STATE OF OHIO,

v. *Petitioner,*

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF

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Petitioner, the State of Ohio, respectfully submits this Reply to the Brief in Opposition filed by Respondent, Matthew Reiner. Petitioner files this brief under Rule 15.6 of the Rules of this Court.

REASONS TO GRANT THE WRIT

In his Brief in Opposition, Respondent claims that the Ohio Supreme Court's ruling rests solely on an adequate and independent state ground and that the constitutional issues raised by Petitioner were not properly raised below. Finally, Respondent argues that the State of Ohio is the sole and final arbiter of standing. Respondent errs on all of these points.

I. THE DECISION OF THE SUPREME COURT OF OHIO RAISES FEDERAL QUESTIONS THAT INVOKE THE JURISDICTION OF THIS COURT.

In *State v. Reiner,* 93 Ohio St.3d 601, 757 N.E.2d 1143 (2001), *Reiner II*, the Supreme Court of Ohio found that the government's grant of immunity to its witness was not appropriate. Respondent would have this Court conclude that that was all that the Ohio court found. But even a cursory reading of *Reiner II* shows that the Supreme Court of Ohio did much more than merely apply state law to find that a grant of immunity was not appropriate in this particular case.[1]

First, the Supreme Court of Ohio created a prophylactic rule that grants of immunity are never proper in an "either/or" situation, that is, when either the defendant

[1] The text of the Ohio immunity statute can be found in the Petition for Writ of Certiorari. (Appendix 23-24).

or the witness sought to be immunized might be guilty of the offense. *Id.*, at Ohio St. 3d 605, N.E.2d 1146. That holding effectively expanded the Fifth Amendment in an "either/or" situation and created a "super-privilege" that could never be overcome by a grant of immunity. The result is a disturbance of the delicate balance that has historically existed between a witness's right to assert the privilege against self-incrimination and the government's legitimate interest in obtaining needed testimony through grants of immunity. It is the ramifications of its decision on the Fifth Amendment and on the ability of the government to grant immunity, which itself is part of the "constitutional fabric,"[2] that presents one of the federal questions suitable for review by this Court.

The Supreme Court of Ohio went even further in its opinion, however. Its own precedent held that neither the State of Ohio nor the defense could call a witness to the stand for the express purpose of having that person assert a Fifth Amendment right to silence in front of the jury.[3] In *Reiner II*, however, after first holding that the witness could not be compelled to testify, the Supreme Court of Ohio stated: "The jury should have been permitted to hear Batt take the Fifth Amendment and to evaluate her testimony on that basis." 93 Ohio St.3d at 605, 757 N.E.2d at 1146. This holding deprives the government of the process it is due when engaged in a criminal prosecution. Thus, this holding raises a question of constitutional dimension that alone invokes the jurisdiction of this Court.

[2] *Kastigar v. United States*, 406 U.S. 441, 447 (1972); *Ullmann v. United States*, 350 U.S. 422, 438 (1956).

[3] See *State v. Kirk*, 72 Ohio St. 3d 564, 566-569, 651 N.E.2d 981, and paragraph one of the syllabus (1995); *State v. Dinsio*, 176 Ohio St. 460, 465-468, 200 N.E.2d 467, 470-472 and syllabus (1964).

In his Brief in Opposition, Respondent fails to address these two main concerns. Petitioner agrees with Respondent that Ohio's immunity statute is unique in that it requires judicial review of immunity-grant requests, but it is the Ohio Supreme Court's flawed application of this power that invokes this Court's jurisdiction. Even though state courts have the right to interpret state law freely, they do not have the power to affect adversely federal constitutional rights in the process. Respondent's reasoning would permit any state court to offend the United States Constitution and federal law with impunity, so long as it did so in the course of interpreting and applying a state statute.

Moreover, Respondent's assertion that the decision below rested solely on an interpretation and application of state law is belied by the Ohio Supreme Court's historical reliance on the United States Constitution and federal concepts in this area of the law. The Ohio Supreme Court in *State v. Sinito,* 43 Ohio St. 2d 98, 99, 330 N.E.2d 896, 897 (1975), endorsed the concept that Ohio's immunity statute is part of the "constitutional fabric," just as is the federal immunity statute, 18 U.S.C. § 6003. In so doing, *Sinito,* in a practice apparently anathema to Respondent, relied on law from other state and federal jurisdictions and invoked the Fifth Amendment of the United States Constitution as well as its Ohio counterpart, Article I § 10. (Appendix 1-2). Thus, the Ohio Supreme Court was, and continues to be, influenced by the United States Constitution and law from other state and federal courts when it broaches the issue of an immunity grant after a Fifth Amendment

privilege has been asserted.[4]

The Ohio Supreme Court has also adopted the rule accepted in both federal and state courts that the executive, not the judiciary, should be the arbiter of when and to whom immunity should be granted.[5] Nevertheless, in a stunning about-face, the Ohio Supreme Court in *Reiner II,* for reasons known only to it, has gone against the vast weight of its own precedent, as well as the established rule of law in other jurisdictions. This, in turn, led the Ohio court to effectively amend the Fifth Amendment by creating a "super-privilege" in "either/or" cases and to impermissibly prejudice the government by holding that a criminal defendant should be permitted to call a recalcitrant witness to the stand for the sole purpose of invoking a Fifth Amendment right.

This Court is familiar with the applicable considerations when viewing assertions of adequate and independent state grounds:

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[4] In addition, the Ohio Supreme Court in *State v. Conrad*, 50 Ohio St. 3d 1, 4, 552 N.E.2d 214, 217 (1990) has equated the immunity under Ohio's statute governing testimony in front of the legislature with that of 18 U.S.C. § 6002.

[5] In *State ex rel. Leis v. Outcalt,* 1 Ohio St. 3d 147, 149, 438 N.E.2d 443, 446 (1982), the Ohio Supreme Court ruled: "The present statute, however, clearly reflects the intent of the General Assembly that immunity be used only as a prosecutorial tool to fulfill the government's need for testimony." The Ohio Supreme Court has even determined that an appellate tribunal should not insert itself into the immunity process. *State ex rel. Koren v. Grogan*, 68 Ohio St. 3d 590, 594, 629 N.E.2d 446, 450 (1994). As the Ohio court stated: "It would be incongruous to conclude, in light of the plain language of R.C. 2945.44, that a grant of immunity pursuant to R.C. 2945.44 by one court is operative only at the discretion of some other court. The statute directs otherwise . . . ." *Id.*

> In *Michigan v. Long,* 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), we adopted a standard for determining whether a state-court decision rested upon an adequate and independent state ground. When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.,* at 1040-1041.

Arizona v. Evans, 514 U.S. 1, 7 (1995).

Under this standard, the Ohio Supreme Court's decision in *Reiner II* is disposed for review by this Court because it rests on federal law concepts and its ramifications affect the Fifth Amendment of the United States Constitution. Even though state courts may freely interpret state law, they cannot adversely affect federal constitutional rights in the process. Here, the Ohio Supreme Court misinterpreted and abrogated federal rights founded in the Fifth Amendment of the United States Constitution. The Ohio Supreme Court ignored the dictates of immunity law by stating that immunity cannot be granted when the witness in question, rather than the defendant, might be culpable of the crime. It also acted improperly when it prospectively forced a witness claiming a Fifth Amendment privilege to assert the privilege in front of the jury.

Reiner II cannot dodge review merely because the Supreme Court of Ohio did not expressly invoke the United States Constitution or rely on federal law in its

decision. Try as it might, a state supreme court cannot evade this Court's jurisdiction by avoiding any express citation to applicable federal rights while engaging them implicitly. Instead,

> where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other our jurisdiction is plain. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question.

Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 164 (1917) (citations omitted).

Moreover, as stated in *Arizona v. Evans, supra,* at 8-9: "State courts, in appropriate cases, are not merely free to — they are bound to — interpret the United States Constitution. In doing so, they are *not* free from the final authority of this Court." (emphasis in original) Thus, when the Ohio Supreme Court made its decision in *Reiner II*, it was duty bound to follow the dictates of the Fifth Amendment of the United States Constitution, as well as the decisions of this Court, even if those sources were not mentioned by name in its opinion. Yet the Ohio Supreme Court has neglected this Court's mandate to apply the United States Constitution when it is germane to the case. It has also neglected the principle that an interpretation of state law may not offend the Federal Constitution. These errors should not inure to the benefit of Respondent.

II. CONSTITUTIONAL ISSUES ARE PROPELY BEFORE THIS COURT FOR ITS REVIEW.

Respondent contends that Petitioner's constitutional claims in general, and its separation of powers argument in particular, were not timely and properly raised below. Respondent's consternation is misplaced.[6] The procedural history of this case demonstrates that Petitioner has raised the constitutional issues at the first opportunity. In *State v. Reiner*, 89 Ohio St. 3d 342, 352-356, 731 N.E.2d 662, 673-676 (2000), *Reiner I*, Respondent argued that the grant of immunity was improper only because the witness did not have a valid Fifth Amendment privilege to assert. The Supreme Court of Ohio agreed; this Court did not.[7]

On remand, Petitioner stated "to reconstrue the validity of the trial court's grant of immunity, such consideration could only turn on a theory not previously advanced by Reiner, not previously addressed by the State, and not embodied in [the Ohio Supreme] Court's original holding." (Appendix 6). In response, the Supreme Court of Ohio merely ordered additional briefing on the following issue: "What effect, if any, does the judgment of the Supreme Court of the United States have on this Court's holding that 'the grant of immunity was unlawful?'." (Appendix 9).

---

[6] Additionally, two points are worthy of note. First, Petitioner's contention that the Respondent lacked standing to challenge the grant of immunity to the State's witness was raised in the Ohio Supreme Court, *Reiner II, supra*, at Ohio St. 3d 607, N.E.2d 1148 fn1 (Cook, J., dissenting). Second, the prohibition against this Court considering issues not raised below is not absolute. *Glover v. United States*, 531 U.S. 198, 205 (2001).

[7] *Ohio v. Reiner*, 532 U.S. 17, 18, 20-21 (2001).

After briefing on this general issue, the Supreme Court of Ohio held that the grant of immunity to the State's witness was unlawful because it did not further the administration of justice. That conclusion, though frustrating, was not especially surprising. What was surprising was the rationale offered by the Ohio court for its conclusion. Instead of finding that the trial court had abused its discretion under the particular facts of this case, the Supreme Court of Ohio handcuffed the government in numerous criminal cases by holding that grants of immunity are never proper in so-called "either/or" situations. Equally surprising was the court's rejection of its own precedent to conclude that the witness "taking the Fifth" could be called by the defense for the sole purpose of invoking the privilege in front of the jury.

Until the Supreme Court of Ohio issued its opinion in *Reiner II*, Petitioner had no reason to anticipate that the state court would offend the Fifth Amendment and restrict the correlative governmental tool of granting immunity in the way that it did or for the reasons that it did. Indeed, Petitioner was not prescient enough to anticipate that the same court which in *Reiner I* had held that the government's witness possessed no Fifth Amendment privilege because she claimed her innocence would conclude in *Reiner II* that this same witness could not be granted immunity because she might be guilty.

Therefore, Petitioner filed a motion for reconsideration and argued that *Reiner II* impermissibly infringed on the scope of the government's use of immunity as a tool in criminal prosecutions. (Appendix 18-22). Petitioner also contended that the court had been incorrect in pronouncing that the defense should be allowed to call the witness asserting the privilege for the sole

purpose of invoking the privilege in the presence of the jury. (Appendix 29-30). Petitioner repeated these arguments in its Petition.

Petitioner has raised the constitutional issues challenging the Ohio decision as soon as possible. The constitutional problems inherent in the Ohio decision were created by the Supreme Court of Ohio when it issued its opinion following remand from this Court. Therefore, the issues raised by Petitioner are properly before this Court for review.

III. STANDING IS AN ISSUE THAT THIS COURT COULD ADDRESS IF THE WRIT FOR CERTIORARI IS GRANTED.

Finally, Respondent argues that standing is purely a matter of state law. He is only partially correct. Although state courts and legislatures are free to establish their own rules of standing, these powers end when federal constitutional rights are affected. As Justice Oliver Wendell Holmes Jr. stated in *Davis v. Wechsler,* 263 U.S. 22, 24-25 (1923) (citations omitted):

> The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

The present case contains the "plain assertion of federal right" of which Justice Holmes spoke. See also, *Love*

v. Griffith, 266 U.S. 32, 33 (1924). The government's witness asserted her Fifth Amendment privilege against self-incrimination. According to every court that has decided the issue, including the Ohio Supreme Court [see *State v. Coleman*, 75 Ohio St.3d 454, 455, 663 N.E.2d 924, 925 (1996)], a criminal defendant simply lacks standing to challenge the subsequent, and correlative, grant of immunity to a witness. Similarly, a criminal defendant should not be afforded the opportunity to defeat a governmental grant of immunity merely by claiming that the witness seeking immunity is the culpable party. Yet this is a consequence of the decision of the Ohio Supreme Court. Similarly, a criminal defendant should not be permitted to benefit impermissibly from a witness's decision to invoke the Fifth Amendment privilege. Yet this, too, is a consequence of the Ohio Supreme Court's holding that a criminal defendant should be allowed to call a reluctant witness to the stand for the sole purpose of invoking the privilege in the presence of the jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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Lucas County, Ohio

J. Christopher Anderson
Counsel of Record
Assistant Prosecuting Attorney
Counsel for Petitioner

APPENDIX

OH Const Art. I § 10 (Anderson 2002)

§ 10 Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the

court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	S.C. No. 99-239
	*	
Plaintiff-Appellant,	*	On Remand from
	*	the Supreme
	*	Court of the
-vs-	*	United States,
	*	Case No. 00-1028
	*	
MATTHEW REINER	*	
	*	
Defendant-Appellee.	*	

MOTION FOR PROCEDURAL CLARIFICATION FOLLOWING REMAND FROM SUPREME COURT OF THE UNITED STATES

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In its decision of March 19, 2001, the Supreme Court of the United States remanded this case to this Court for further proceedings not inconsistent with its opinion, but it expressly declined to address the question whether immunity was appropriate. See *Ohio v. Reiner* (2001), ——— U.S. ———, 69 U.S.L.W. 3616.

No procedural rules of this Court appear to address the future course of proceedings or opportunity for the parties to be heard subsequent to such remand. However, Rule 14, Section 4(A) of this Court provides for motion practice in connection with pending matters. Pursuant thereto, the State of Ohio hereby moves for clarification of the procedural posture of this action in the form of notice to the parties of those issues construed by the court to arise from the remand, and/or an opportunity to be heard orally or in writing as appropriate, and/or for such other or further relief as this Court deems just and proper under the unique circumstances for the reasons noted in the Memorandum below.

MEMORANDUM IN SUPPORT

Appellee/Cross-Appellant Reiner (hereinafter referred to as "Reiner"), in his Proposition of Law No. 1 in his brief in support of cross-appeal before this Court, challenged the grant of immunity to Susan Batt by the trial court on one ground and one ground only — that the witness lacked a valid Fifth Amendment claim. While Reiner challenged the contentions of Appellant (hereinafter referred to as "the State") that he lacked standing to be heard on the request for immunity (Reiner's brief, pgs. 1-3) and that he waived any such objection thereto (Reiner's brief, pgs. 3-5), a close reading of his arguments, especially at pages 5-7 of his brief, reveals that he articulated no other theory whatsoever to support his claim of wrongfulness in the grant of immunity.

This Court, in its opinion, recognized that Reiner challenged the immunity grant "because Susan Batt did not have a valid Fifth Amendment privilege." *State v. Reiner* (2000), 89 Ohio St.3d 342, 352. The Court overruled the State's contention that Reiner failed to preserve error by properly objecting to the grant of immunity. *Id.* at 356. But a careful reading of this Court's opinion reflects that it sustained Reiner's Fifth Amendment argument and neither addressed nor articulated any other theory of claimed deficiency in the grant of immunity. Additionally, this Court overruled the State's argument that Reiner lacked standing to challenge immunity solely on the basis of the absence of a Fifth Amendment privilege. As the Court put it:

> The State argues that a defendant lacks standing to challenge a grant of immunity (citations omitted). This argument assumes that the grant of immunity met the statutory threshold of a valid privilege against self-incrimination. Because Susan Batt lacked a valid Fifth Amendment privi-

lege against self-incrimination and the grant of immunity was unlawful, the State's standing argument lacks merit. *Id.*

As such, and in light of the judgment of the Supreme Court of the United States, if this Court is inclined on remand to reconstrue the validity of the trial court's grant of immunity, such consideration could only turn on a theory not previously advanced by Reiner, not previously addressed by the State, and not embodied in this Court's original holding. Additionally, such a revisitation of the immunity issue must analyze, *de novo,* the State's standing argument with the perspective of the United States Supreme Court's opinion that Susan Batt did, as a matter of law, properly invoke a Fifth Amendment privilege.

CONCLUSION

For the above reasons, the State moves for such relief as this Court deems appropriate, including but not limited to:

1) Notice from this Court to both parties of the issue or issues that this Court now believes critical to the resolution of such matters, if any, remaining unresolved upon remand from the Supreme Court of the United States; and/or

2) An opportunity for both parties to file further briefs pursuant to the remand; and/or

3) An opportunity for further oral argument if any reframed issues compel a conclusion that the focus of any previously unresolved, unwaived, matters are of critical importance to the

development of the law; and/or

4) Such other and further relief as this Court deems just and proper.

Respectfully submitted,

JULIA R. BATES,
PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: /s/_____
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Assistant Prosecuting Attorney

By: /s/_____
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Assistant Prosecuting Attorney
COUNSEL FOR APPELLANT,
STATE OF OHIO

PROOF OF SERVICE

I hereby certify that a copy of this Motion For Procedural Clarification Following Remand From Supreme Court Of The United States was sent by ordinary U.S. Mail to Co-Counsel for Appellee, Samuel Z. Kaplan, Kaplan & Lipson, 835 Spitzer Building, 520 Madison Avenue, Toledo, Ohio 43604; Fritz Byers, 824 Spitzer Building, Toledo, Ohio 43604; and Robert Z. Kaplan, 830 Spitzer Building, Toledo, Ohio 43604, on

this 25th day of April, 2001.

__/s/_____
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__/s/_____
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COUNSEL FOR APPELLANT,
STATE OF OHIO

THE SUPREME COURT OF OHIO

Filed May 23, 2001

State of Ohio, Appellant/Cross Appellee,	:	Case No. 99-239
v.	:	
Matthew Reiner, Appellee/Cross-Appellant.	:	ENTRY

Upon consideration of appellant/cross-appellee's motion for procedural clarification following remand from the Supreme Court of the United States and appellee/cross-appellant's motion to set briefing schedule and oral argument,

IT IS ORDERED by the Court that the motion to set briefing schedule be, and hereby is, granted, and the motion for oral argument be, and hereby is, denied.

IT IS FURTHER ORDERED by the Court that the parties shall brief the following issue:

> What effect, if any, does the judgment of the Supreme Court of the United States have on this Court's holding that "the grant of immunity was unlawful"?

IT IS FURTHER ORDERED by the Court that the cross-appellant shall file an appellant's brief within 40

days from the date of this entry; the cross-appellee shall file an appellee's brief within 30 days after the filing of the cross-appellant's brief; the cross-appellant shall file a reply brief, if any, within 20 days after the filing of the cross-appellee's brief; and the parties shall otherwise proceed in accordance with S. Ct. Prac. R. VI.
(Lucas County Court of Appeals: No. L971002)

/s/
THOMAS J. MOYER
Chief Justice

0014r052301

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Supreme Court Case
	*	Nos: 99-239 & 99-427
	*	
Appellant/	*	On Appeal
Cross-Appellee,	*	from the
	*	Lucas County
	*	Court of Appeals,
-vs-	*	Sixth Appellate
	*	District
	*	
MATTHEW REINER,	*	Upon remand
	*	from the
	*	United States
	*	Supreme Court
Appellee/	*	
Cross-Appellant.	*	Court of Appeals
	*	Case No: L-97-1002

APPELLANT / CROSS-APPELLEE'S MOTION FOR RECONSIDERATION
AND MEMORANDUM IN SUPPORT

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MOTION

Appellant/Cross-Appellee State of Ohio, by and through counsel, hereby moves this Honorable Court, pursuant to S. Ct. Prac. R. XI, for reconsideration of the Court's decision on the merits in this case, rendered November 28, 2001, and reported at 93 Ohio St.3d 601. Specifically, this Court is urged to reconsider its holding that the trial court's grant of immunity from prosecution for witness Susan Batt "severely prejudiced the rights of the defendant and did not further the administration of justice." 93 Ohio St.3d at 605. The reasons why this

motion should be granted, and why this Court should reconsider its decision and find that the trial court's grant of immunity did not constitute reversible error, are explained fully in the memorandum below, which is incorporated into this motion as if fully rewritten herein.

Respectfully submitted,

JULIA R. BATES,
PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:_____/s/_____
John J. Weglian, #0020674
Assistant Prosecuting Attorney

____/s/_____
Craig T. Pearson, #0030459
Assistant Prosecuting Attorney

MEMORANDUM IN SUPPORT

Introduction

This case arose out of events that occurred on August 28, 1995. On that day, Alex, the infant son of the Appellee/Cross-Appellant, was in the care of babysitter Susan Batt until Deborah Reiner returned home from work. Susan Batt left the Reiner residence between 5:30 and 6:00 p.m. Later, Deborah Reiner's parents visited until Matthew Reiner arrived home at 7:30 p.m. Deborah and Matthew Reiner put Alex to bed at approximately 10:30 p.m. Later, after hearing Alex whimpering, Matthew Reiner took the child downstairs. Within a half hour, Alex's breathing became labored and he became unresponsive. After awakening his wife, Matthew Reiner called 9-1-1. By the time that emergency personnel arrived, Alex had no pulse and was not breathing. Although initially put on a respirator at the hospital, Alex was removed from life support two days later and died.

Matthew Reiner was subsequently charged with involuntary manslaughter. All of the persons with Alex on the day of his death were possibly responsible for the child's death, including Susan Batt, Deborah Reiner, Alex's grandparents, and Matthew Reiner. The Office of the Lucas County Prosecutor prosecuted Matthew Reiner based on the opinion of the Lucas County coroner that Alex had died from "shaken baby syndrome," his opinion that the shaking had occurred shortly before the onset of Alex's respiratory arrest when Alex had been alone with Matthew Reiner, and the experience of the prosecutor's office with other cases of shaken baby syndrome which suggested a short time period between the injury to infants and their respiratory arrest.

At trial, the State adduced the testimony of the Lucas County coroner that Alex had died of shaken baby syndrome. Specifically, the coroner opined that Alex had died as the result of axonal shearing, an injury that would cause respiratory arrest within a short period of time. This expert opinion was buttressed by the testimony of two additional board certified pathologists. On the other hand, defense experts hypothesized that Alex had died from an edema rather than axonal shearing. Death by edema would have lengthened the time period between the injury to Alex and his respiratory arrest so that someone other than Matthew Reiner, specifically Susan Batt, could have been responsible for the shaking and the subsequent death of the child.

Susan Batt was subpoenaed by both the prosecution and the defense. Upon the advice of counsel, she asserted her Fifth Amendment right against self-incrimination and refused to testify. Following a hearing, the trial court granted immunity from prosecution to Susan Batt pursuant to R.C. 2945.44. Matthew Reiner was subsequently convicted of involuntary manslaughter and sentence to five years probation.

Matthew Reiner appealed his conviction to the Sixth District Court of Appeals, and the conviction was reversed on grounds of juror misconduct. *State v. Reiner* (Dec. 18, 1998), Lucas App. No. L-97-1002, unreported. This Court subsequently found the reversal by the Court of Appeals improper as to juror misconduct.

This Court upheld the reversal of the judgment of conviction, however, on the ground that the trial court had improperly granted immunity to Susan Batt. According to this Court, Susan Batt did not have a valid Fifth Amendment privilege to assert because she consis-

tently denied all culpability. *State v. Reiner* (2000), 89 Ohio St.3d 342. On March 19, 2001, the Supreme Court of the United States, noting that the Fifth Amendment protects the innoent and guilty alike, reversed this Court. *Ohio v. Reiner* (2001), 532 U.S. ___, 121 S.Ct. 1252, 149 L.Ed.2d 158.

On remand from the U.S. Supreme Court, this Court has now decided that although Susan Batt had a valid right against self-incrimination to assert, the trial court erred when it granted immunity to Batt pursuant to R.C. 2945.44. According to this Court, the trial court erred because the grant of immunity did not further the administration of justice. Also according to this Court, the trial court's error resulted in prejudice to Matthew Reiner severe enough to warrant reversal of his conviction. It is to this latest decision of this Court that the State objects.

Argument [1]

The majority of this Court did not analyze the evi-

[1] Because a motion for reconsideration should not be a reargument of the case, S.Ct.. Prac. R. XI, § 2(A), the State has attempted to confine its argument here to objections to this Court's decision of November 28, 2001. The State in no way waives or recants any of the arguments that it has heretofore made in urging this Court to affirm the trial court's grant of immunity to Susan Batt. In particular, the State continues to insist that Matthew Reiner lacks standing to challenge either Batt's assertion of a Fifth Amendment right or the trial court's grant of immunity. In addition to the cases previously cited by the State and those authorities appearing in the footnote of the dissenting opinion in this case, the Court's attention is directed to *State v. Wolery* (1976), 46 Ohio St.2d 316, 319, where this Court stated: "Whether the purported grant of immunity to witnesses Stroebel and Johnston will effectively shield those individuals from a future prosecution based upon their testimony in appellant's trial is of no concern to the appellant. The Fifth Amendment privilege against self-incrimination is personal to each witness. *Hale v. Henkel* (1906), 201 U.S. 43." (footnote omitted)

dence presented to the trial court or the rationale of the trial court when it granted statutory immunity to Susan Batt. If it had done so, the deferential standard of review ("abuse of discretion") would have counseled for upholding the trial court's grant of immunity. Instead, the majority reached its conclusion that the trial court erred by adopting a bright-line, prophylactic rule that states that grants of immunity under R.C. 2945.44 are inappropriate in an "either/or" situation. The crux of the Court's decision lies in the pronouncement: "[I]mmunity is not appropriate in the either/or situation; it could actually hinder the search for truth." 93 Ohio St.3d at 605.

As explained more fully below, this holding is faulty for a variety of reasons. The ruling inappropriately interferes with the broad discretion traditionally afforded to prosecutors concerning whom to charge with crimes and how to best prosecute the likely offenders. Risk/reward analysis counsels for permitting, not prohibiting, grants of immunity in "either/or" situations. Even if the rule that immunity is inappropriate in an "either/or" situation is valid, it has been adopted by the Court without guidance to lower courts for its implementation. At any rate, even if the trial court erred in granting immunity to Susan Batt, the error was harmless.

Finally, on an unrelated matter, the Court's decision also improperly suggests that a witness who asserts a Fifth Amendment privilege can be called to the stand during trial for the purpose of asserting that privilege in front of a jury.

1. *The rule announced through this decision inappropriately interferes with prosecutorial discretion.*

As was recognized even in the majority opinion of the Court in this case, "[i]mmunity is a prosecutorial tool utilized to fulfill the government's need for testimony." 93 Ohio St.3d at 604 (citing State ex rel. *Leis v. Outcalt* (1982), 1 Ohio St.3d 147, 149, 438 N.E.2d 443, 446). In the federal system, the prosecutor alone decides to whom use immunity should be granted. A federal trial court's grant of immunity to a witness is a purely ministerial function. See 18 U.S.C. §§ 6003, 6004; see also *United States v. Mohney* (6th Cir. 1991), 949 F.2d 1397, 1401; *United States v. Hooks* (7th Cir. 1988), 848 F.2d 785, 798-799 ("It is the duty of the prosecutor to balance 'the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law.'") (citation omitted); *United States v. Taylor,* 728 F.2d 930, 934 (7th Cir. 1984), cert. denied, 479 U.S. 1056 (1987) ("Both the exclusive nature of Congress's delegation and the fact that the balancing process is wholly within the expertise of the executive branch foreclose the federal courts from taking more than a ministerial role in prosecutorial immunity decisions that are made properly under 18 U.S.C. § 6003."); *In re Daley,* 549 F.2d 469, 478-79 (7th Cir.), cert. denied, 434 U.S. 829 (1977) ("[T]he determination of whether the conferral of immunity is proper in a particular case "requires intimate familiarity with the nature and details of the investigation and the background of the witness." *Murphy v. Waterfront Commission,* 378 U.S. 52, 100, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964) (White,

J., concurring). This is knowledge to which the federal prosecutor, and not the federal court, is privy, and it is therefore the authority of the United States Attorney to confer such extensive immunity which must be scrutinized.")

In Ohio, the granting of transactional immunity is governed by statute.

> In any criminal proceeding in this state or in any criminal or civil proceeding brought pursuant to sections 2923.31 to 2923.36 of the Revised Code, if a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:
>
> (1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;
>
> (2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.

R.C. 2945.44(A). Unlike the federal system, the state trial court does have a role to play in determining that a particular witness should be granted immunity.

The plain language of the statute and its operation make clear, however, that a great deal of deference should be paid to a prosecutor's request for immunity. It is the prosecutor, and the prosecutor alone, who initiates

the granting of immunity by making a written request. After that request is made, the trial court is commanded to grant immunity ("shall compel the witness to answer") "unless it finds that to do so would not further the administration of justice." R.C. 2945.44(A) (emphasis added) In effect, a rebuttable presumption exists that a grant of immunity is proper. That presumption is overcome only if the trial court affirmatively finds that the grant of immunity would not further the administration of justice.

Traditionally, it has been the responsibility of the prosecutor to assess the evidence against suspects. The prosecutor decides whom to prosecute and for what crimes. In making this determination, a prosecutor typically assesses the likely culpability, as well as the relative culpability, of various parties. To facilitate the prosecution of one person, a prosecutor may offer plea agreements or other inducements for the testimony of witnesses.

This Court apparently has no consternation concerning grants of immunity in the "typical" situation. This "typical" situation was described by the Court in the following way:

> The government typically requests that immunity be granted to a witness who is culpable to some extent but whose testimony will also implicate a defendant. Usually the witness's involvement in the situation is of a lesser nature. The government is willing to forgo prosecution of the less culpable witness in order to obtain testimony that is necessary to successfully prosecute the defendant.

93 Ohio St.3d at 604. Thus, in the "typical" situation, this Court is apparently willing to permit the prosecutor

to assess the relative culpability of several potentially culpable persons and obtain grants of immunity to facilitate the prosecution of the person whom the prosecutor believes to be more criminally responsible for the offense.

Yet in the "typical" situation involving multiple offenders (as in any criminal prosecution), the prosecutor may turn out to be wrong. The person granted immunity in the "typical" situation may, in fact, be the greater miscreant. The grant of immunity in the "typical" situation acts to preclude the prosecution of a person believed by the State to be culpable to some extent, and who may be primarily responsible for the offense. Nevertheless, the risk of error in the "typical" situation is borne by the prosecutor.

This Court has failed to explain why the risk of error should not be borne by the prosecutor in the same manner in the "either/or" situation. Otherwise stated, this Court has failed to explain why the distinction between the "typical" situation and the "either/or" situation is anything more than a distinction without a difference.

In an "either/or" situation like the instant case, a prosecutor will have assessed the relative culpability of various persons in light of the evidence and determined that the criminal responsibility of one or more persons is likely to be zero. (In the instant case, based on the physiological mechanism of "shaken baby syndrome" in this case and the temporal proximity of only Matthew Reiner, the prosecutor ruled out other persons, including Susan Batt, as the perpetrator of the offense.) Although the prosecutor might be wrong, the risk of error should be borne by the prosecutor just as it is in the "typical" situation involving a grant of immunity.

The State should be permitted in the "either/or" situation to obtain the testimony of persons whom the prosecutor believes to be free of guilt, but who may be understandably reluctant to testify when the defense is pointing fingers at them. Indeed, if anything, the prosecution should be able to obtain grants of immunity in "either/or" situations more readily than in the "typical" situation. In the "typical" situation, it must be remembered, a grant of immunity will result in the State's inability to prosecute a person whom the government already believes is culpable to some extent. In the "either/or" situation, a grant of immunity will preclude the prosecution of a person whom the State believes is not culpable, but who may be.

A prosecutor should not be penalized in the "either/or" situation for merely doing what prosecutors must do as part of their duties, namely, assessing the evidence and weighing the relative culpabilities of various parties. This Court should not remove the grant of immunity from the prosecutorial toolbox merely because a case falls into an "either/or" category. Instead, just as in the "typical" cases, prosecutors should make the determination of whom to prosecute and should be afforded all of the tools, including grants of immunity, necessary to affect a successful prosecution. In the instant case, by promulgating a bright-line, prophylactic rule that carves out an exception to the grant of statutory immunity, this Court has encroached on the province of the prosecutors and impeded the ability of the State to obtain convictions against persons whom it believes to be responsible for criminal offenses.

2. *Risk/Reward analysis counsels for grants of immunity in "either/or" situations, not a prohibition.*

Following its description of the "typical" grant of immunity situation, the majority opinion attempted to distinguish the instant case.

> Here, the prosecution did not have two potentially culpable persons. Instead, this was an either/or situation. Either Reiner was guilty or Susan Batt was guilty. The government chose to indict Reiner and claimed that there was insufficient evidence to indict Batt. Batt continually claimed her innocence.

93 Ohio St.3d at 605. The opinion then announced the rule that "immunity is not appropriate in the either/or situation." *Id.*

It is unclear from the opinion precisely why this Court concluded that grants of immunity are not appropriate in "either/or" situations. The most likely reason is that the majority was concerned that the person immunized in an "either/or" situation might be the guilty party. After all, in the worst-case scenario involving a grant of immunity in an "either/or" situation, the immunized witness could take the stand, confess to the crime, and remain free from prosecution.

Concerns that an immunized, yet guilty, party might escape the "administration of justice" in an "either/or" situation are not particularly well-founded. First, as has already been noted, prosecutors, as a matter of practice, analyze the evidence surrounding offenses and weigh the relative culpabilities of the potential offenders. There is no reason to believe that most prosecutors are not making their assessments in a competent manner. A

competent analysis by a prosecutor will significantly diminish the risk that immunity will be sought for a person guilty of the crime.

Next, as occurred in the instant case, the immunized witness will often continue to deny culpability even after invoking a Fifth Amendment privilege against self-incrimination. Asserting a Fifth Amendment privilege on the advice of counsel, even in an "either/or" situation, is an insufficient reason to conclude that the witness might be the culpable party. Having already decided not to prosecute the witness, nothing is lost if the witness is immunized from prosecution. Indeed, even if the witness, once immunized, confesses to the crime on the witness stand, nothing has been lost as a result of the immunization, because the State will have already decided not to prosecute the witness prior to seeking immunity.

Finally, even in the worst-case scenario, the administration of justice will still be served, because an innocent defendant will be exonerated. In the instant case, for example, if Susan Batt had taken the stand and confessed to the crime, the case against Matthew Reiner would either have been dismissed or the jury would have returned with a verdict of not guilty. The "administration of justice" is not synonymous with "conviction of the guilty." The administration of justice is furthered when the truth comes out and when one innocent of criminality is not wrongly convicted.

The foregoing demonstrates that the "downside risk" associated with a grant of immunity in an "either/or" situation is minimal. On the other hand, the testimony of the immunized witness might be valuable in a search for the truth. Indeed, the testimony of the immunized wit-

ness could prove valuable to either the prosecution or the defense.

3. *The rule that immunity is not appropriate in an "either/or" situation has been announced in this case without guidance to the lower courts for its application.*

Even if the rule is valid, the majority opinion of this Court in this case does not clarify when an "either/or" situation may be said to exist in order to preclude a grant of immunity. Does an "either/or" situation exist whenever a defendant points an accusatory finger at the witness for whom immunity is sought by the prosecutor, claiming that this someone else, and not the defendant, is actually responsible for the crime? If this is sufficient, then defendants will be in a position to frustrate the use of the prosecutorial tool of immunity by alleging that the putative witness is, or could be, the perpetrator. This would turn on its head the operation of grants of immunity under R.C. 2945.44, including the deference to be accorded to prosecutors and the rebuttable presumption that a grant of immunity is warranted.

If more than a defendant's accusation against a witness is needed to create a bona fide "either/or" situation, then what else is necessary? Does an "either/or" situation that is sufficient to preclude a grant of immunity exist only when the demonstrative evidence and likely testimony of various witnesses at trial raise the possibility that the witness sought to be immunized is the actual perpetrator of the crime? If this is required, then trial courts will be forced to conduct mini-trials whenever a grant of immunity is requested by the State in order to assess the evidence and likely testimony. Such a procedure would inappropriately invade the province of the

prosecutor to determine who should be charged and the province of the jury to weigh the evidence.

4. *The defendant in this case was not prejudiced by the grant of immunity. In addition, any error in the grant of immunity was harmless.*

For the reasons aptly advanced by the dissenting opinion in this case, Matthew Reiner was not prejudiced by the grant of immunity to Susan Batt. In addition, the theory of the case that was presented to the jury by the prosecutor demonstrates that any error in granting immunity to Susan Batt was harmless.

According to the Court of Appeals, "[i]n the present case, the only real issue in dispute is the amount of time elapsed between the trauma inflicted to Alex Reiner and his respiratory arrest."

In his merit brief to this Court, Matthew Reiner posed the issue thusly:

> The central question at trial was how much time elapsed between when Alex had been shaken and when he went into arrest. The State's case hung on proving, by the testimony of Dr. James Patrick, that the act of fatal shaking occurred during a small time-interval when Matthew Reiner was alone with Alex
>
> * * *
>
> Alex Reiner indisputably died as a result of "shaken-baby syndrome." He had been shaken so violently that his brain was damaged to the extent of causing respiratory arrest. The State's case against Matthew Reiner was entirely inferential: it depended on the State proving beyond a reasonable doubt that the fatal shaking must have occurred during a small window of time when Matthew

Reiner was alone with his son.

On August 28, Alex and the other Reiner children had been alone with their nanny, Susan Batt, from 7:30 a.m. until 5:30 p.m. Alex was with his mother and grandparents from the time that the nanny left until Matthew Reiner, Alex's father, came home about 7:00 p.m. From then on that evening, Alex was with both of his parents until he was put to bed about 10:15 p.m. There was no dispute that Alex was alone with Matthew Reiner from approximately 10:30 p.m. until about 11:00 p.m. when Alex went into respiratory arrest.

The State hung its case on its ability to prove that the fatal shaking occurred during that thirty-minute interval. To make this proof, in turn, the state attempted (a) to determine the specific neurological mechanism that caused Alex's respiratory arrest, and then (b) to establish how soon after the shaking that specific neurological mechanism would have caused Alex to stop breathing.

The lynch-pin of the State's case against Matthew Reiner was the State's medical hypothesis, advanced by James Patrick, that axonal shearing was the mechanism of respiratory arrest.

Appellee/Cross-Appellant's Combined Brief in Response to Appellant/Cross-Appellee's Brief and Propositions of Law and Argument in Support of Cross-Appeal at 7, 33-34.

This Court has also acknowledged that "[t]he key issue at trial was the timing of the fatal trauma to Alex." 89 Ohio St.3d at 344; see also 93 Ohio St.3d at 603.

The foregoing shows that the jury in this case did not convict Matthew Reiner merely because it might have believed Susan Batt's testimony denying that she had

shaken the infant. On the contrary, in finding Matthew Reiner guilty of involuntary manslaughter, the jury necessarily had to accept as accurate the State's medical evidence and its theory of the neurological mechanism that caused Alex's respiratory failure. The jury also had to reject the defense theory that edema, rather than axonal shearing, was the mechanism of respiratory arrest.

It was the jury's acceptance of the State's scientific evidence, and its rejection the alternative defense theory, that led directly to the conclusion that Matthew Reiner was the perpetrator of the crime. As the defendant candidly admitted in his merit brief to this Court: "If axonal shearing was the mechanism, respiratory arrest would have occurred shortly after the shaking. Matthew Reiner would have to be guilty." Appellee/Cross-Appellant's Combined Brief in Response to Appellant/Cross-Appellee's Brief and Propositions of Law and Argument in Support of Cross-Appeal at 45. In other words, answering the question "What was the mechanism of respiratory arrest?" led inexorably to the answer to the question "Who was responsible for the shaking?"

The trial of this case was essentially a battle between the medical experts. The jury was called upon to assess the merits of the State's theory of the mechanism of respiratory arrest (axonal shearing) and the alternative theory posited by the defense (edema). For a conviction, the jury necessarily had to accept the State's theory and reject the defense's counter-argument. Once the State's theory of the mechanism of respiratory arrest was

accepted by the jury, the conviction of Matthew Reiner was a foregone conclusion.

Given this, it is clear that the jury's acceptance of the testimony of Susan Batt was peripheral. No reasonable jury could have found Matthew Reiner guilty merely because it accepted Susan Batt's testimony that she did not shake Alex. This is especially true because three additional persons, Deborah Reiner and her parents, might have shaken the child and caused the death under the defense theory concerning the mechanism of respiratory arrest.

Therefore, assuming arguendo that the trial court erred when it granted immunity to Susan Batt, any imprimatur thereby placed on the testimony of the babysitter was inconsequential. The jury's verdict in this case did not hinge on an assessment of the credibility of witnesses. The verdict hinged on the jury's assessment of the medical theories propounded by the State and by the defense. Error, if any, in the trial court's grant of immunity to Susan Batt was, therefore, harmless.

5. *The Court should clarify when, if ever, a witness who has been refused immunity may be called to the stand for the sole purpose of invoking the Fifth Amendment right in the presence of a jury.*

The majority opinion ends by stating: "Should the State retry the defendant, Batt may assert her Fifth Amendment right against self-incrimination." 93 Ohio St.3d at 605. The opinion also states: "The jury should have been permitted to hear Batt take the Fifth Amendment and to evaluate her testimony on that basis." *Id.* Taken together, these statements suggest that Susan Batt could have been called to the stand, and could be called during a retrial, not so that testimony

could be adduced, but so that she could assert her Fifth Amendment right in the presence of the jury.

This suggestion runs counter to established precedent that precludes a witness from being called to the stand for the sole purpose of asserting a Fifth Amendment right in the presence of a jury. See, e.g., *State v. Kirk* (1995), 72 Ohio St.3d 564. In the instant case, it is clear at this junction that Susan Batt has a Fifth Amendment right to assert and that she would, in fact, assert that right if called upon to testify without a grant of immunity. It would be improper for her to be called to the stand for the sole purpose of asserting that right in the presence of a jury.

At the least, this Court should clarify the meaning of its statement. The statement that the "jury should have been permitted to hear Batt take the Fifth Amendment" appears to be nothing less than a misstatement of the law.

Conclusion

For any or all of the foregoing reasons, this Court should reconsider its decision of November 28, 2001.

The Court is urged to hold that Appellee/Cross-Appellant lacks standing to challenge either the assertion of a Fifth Amendment right by the State's witness or the grant of immunity by the trial court. Alternatively, this Court is urged to recognize the deference due to prosecutors' requests for immunity and the rebuttable presumption inherent in R.C. 2945.44. This Court should also apply the "abuse of discretion" standard to review the trial court's decision to grant immunity in this case. If any of this is done, the grant of immunity will be upheld.

At the very least, the Court should eschew adoption of a rule that immunity is not appropriate in "either/or" situations. The Court should also clarify (or repudiate) the suggestion in the majority opinion that a witness may be called to testify in a trial for the sole purpose of asserting a Fifth Amendment right in the presence of a jury.

Respectfully submitted,
JULIA R. BATES,
PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By:_____/s/_____
John J. Weglian, #0020674
Assistant Prosecuting Attorney

____/s/_____
Craig T. Pearson, #0030459
Assistant Prosecuting Attorney

Certification

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 7th day of June, 2002, to Samuel Z. Kaplan, 835 Spitzer Building, 520 Madison Avenue Toledo, Ohio 43604; Fritz Byers, 824 Spitzer Building, 520 Madison Avenue, Toledo, Ohio 43604; Richard S. Walinski, Cooper and Walinski, 900 Adams Street, Toledo, Ohio 43624-1568; and Robert Z. Kaplan, 830 Spitzer Building, 520 Madison Avenue, Toledo, Ohio 43604, counsel for the appellee / cross-appellant.

_____/s/_____
John J. Weglian, #0020674
Assistant Prosecuting Attorney
_____/s/_____
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